CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 NOVEMBER 3, 1999 NO. 44

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decision

(T.D. 99–77)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved June 29, 1999, to September 21, 1999, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Date: October 15, 1999.

WILLIAM ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: The Alta Group, Inc.
Articles: Titanium ingots and mill products
Merchandise: Titanium sponge
Application signed: March 2, 1999
Ruling Forwarded to PD of Customs: New York, August 6, 1999
Effect on other rulings: None
Ruling: 44–05791–000

(B) Company: Anagram International, Inc.
Articles: Multi-panel inflatable and non-inflatable products (Mylar balloons)
Merchandise: Metallized nylon film
Application signed: February 8, 1999
Ruling Forwarded to PD of Customs: Chicago, July 19, 1999
Effect on other rulings: None
Ruling: 44–05780–000

(C) Company: Chem-Fleur, Inc.
Articles: Habanolide
Merchandise: Bicyclene oxide
Application signed: January 20, 1999
Ruling Forwarded to PD of Customs: New York, July 1, 1999
Effect on other rulings: None
Ruling: 44–05769–000

(D) Company: Chevron Chemical Company LLC (successor to Chevron Chemical Company under 19. U.S.C. 1313(s))
Articles: Finished lubricating oil additives and components
Merchandise: OLOA 2564 H; OLOA 2564 R.
Application signed: April 14, 1999
Ruling Forwarded to PD of Customs: Houston, August 19, 1999
Effect on other rulings: None
Ruling: 44–05796–000

(E) Company: Cincinnati Specialties, LLC (successor to Cincinnati Specialties, Inc. under 19 U.S.C. 1313(s))
Articles: Methyl anthranilate (MA-FCC)
Merchandise: Isatoic anhydride
Application signed: May 20, 1999
Ruling Forwarded to PD of Customs: New York, August 9, 1999
Effect on other rulings: None
Ruling: 44–05660–000

(F) Company: CONDEA Vista Co.
Articles: Blended linear alkylbenzenes of the N500 family series
Merchandise: Nalkylene 500 linear alkylbenzene a/k/a N500 or N500L
Application signed: April 7, 1999
Ruling forwarded to the PD of Customs: Houston, September 21, 1999
Effect on other rulings: None
Ruling: 44–05819–000

(G) Company: Cyanamid Agricultural de Puerto Rico
Articles: Pivot 70DG herbicide
Merchandise: Imazethapyr technical
Application signed: March 10, 1999
Ruling Forwarded to PD of Customs: New York, August 27, 1999
Effect on other rulings: None
Ruling: 44–05802–000

(H) Company: Eastman Chemical Co.
Articles: Thermx specialty plastics
Merchandise: Textile alkaliless glass strands a/k/a CHOPS (fiberglass)
Application signed: April 8, 1999
Ruling Forwarded to PD of Customs: Houston, September 7, 1999
Effect on other rulings: None
Ruling: 44–05814–000

(I) Company: ESM II Incorporated
Articles: Magnesium metal powder; lime-magnesium blended powders
Merchandise: Magnesium alloy ingots (90%–92% purity)
Application signed: December 16, 1998
Ruling Forwarded to PD of Customs: New York, July 8, 1999
Effect on other rulings: None
Ruling: 44–05777–000

(J) Company: First Chemical Corporation
Articles: Hydrocinnamoyl chloride
Merchandise: Cinnamic Acid
Application signed: December 10, 1998
Ruling Forwarded to PD of Customs: New York, July 27, 1999
Effect on other rulings: None
Ruling: 44–05784–000

(K) Company: General Electric Company
Articles: CYCOLAC® resin pellets
Merchandise: Brominated bisphenol-A resin powder
Application signed: February 5, 1999
Ruling Forwarded to PD of Customs: New York, July 30, 1999
Effect on other rulings: None
Ruling: 44–05788–000

(L) Company: General Electric Company
Articles: Lexan® polycarbonate resin
Merchandise: Para-cumylphenol (PCP)
Application signed: January 8, 1999
Ruling Forwarded to PD of Customs: New York, August 3, 1999
Effect on other rulings: None
Ruling: 44–05781–000

(M) Company: Hail & Cotton, Inc.
Articles: Scrap tobacco; strip tobacco; stem tobacco; blended strip tobacco; blended leaf tobacco
Merchandise: Leaf tobacco; strip tobacco; scrap/refuse tobacco
Application signed: December 1, 1998
Ruling Forwarded to PD of Customs: New York, July 1, 1999
Effect on other rulings: Terminates T.D. 90–28–J (44–05771–000)
Ruling: 44–05771–001

(N) Company: Hexcel Corporation
Articles: Aircraft structural components & fairings, wing parts
Merchandise: Carbon fibre prepregs
Application signed: February 28, 1999
Ruling Forwarded to PD of Customs: San Francisco, August 27, 1999
Effect on other rulings: None
Ruling: 44–05804–000

(O) Company: International Paper Company d/b/a Thilmany
Articles: Foil coated paper
Merchandise: Aluminum foil
Application signed: August 20, 1998
Ruling Forwarded to PD of Customs: Chicago, June 29, 1999
Effect on other rulings: None
Ruling: 44–05768–00

(P) Company: Kuk Rim U.S.A., Inc.
Articles: Nylon fabric; polyester fabric
Merchandise: Acelan spandex bare yarn; synthetic nylon yarn; polyester flat yarn
Application signed: December 28, 1998
Ruling Forwarded to PD of Customs: San Francisco, July 9, 1999
Effect on other rulings: None
Ruling: 44–05774–000

(Q) Company: The Lubrizol Corporation
Articles: Sulfonic acids; basic metal sulfonates; lubricant additives
Merchandise: Polyalkylbenzenes
Application signed: August 19, 1999
Ruling Forwarded to PD of Customs: Chicago, August 31, 1999
Effect on other rulings: Terminates T.D. 86–127–(F) (44–01942–000)
Ruling: 44–01942–001

(R) Company: Magnequench International, Inc.
Articles: Magnequench powder; magnets
Merchandise: Neodymium fluoride
Application signed: November 25, 1998
Ruling Forwarded to PD of Customs: New York, June 29, 1999
Effect on other rulings: None
Ruling: 44–05765–000

(S) Company: North American Processing Company
Articles: Fused magnesia; calcined magnesia; brown fused alumina (crushed and sorted to size)
Merchandise: Brown fused alumina; dead burned magnesia; fused magnesia
Application signed: January 25, 1999
Ruling Forwarded to PD of Customs: New York, July 8, 1999
Effect on other rulings: None
Ruling: 44–05776–000

(T) Company: Pratt & Whitney Talon, Inc.
Articles: Industrial combustion turbine parts
Merchandise: Turbine blades; turbine vanes; turbine heat shields; turbine burner inserts
Application signed: February 22, 1999
Ruling Forwarded to PD of Customs: New York, August 19, 1999
Effect on other rulings: None
Ruling: 44–05798–000

(U) Company: Process Systems International, Inc., d/b/a Process Engineering
Articles: Storage tanks
Merchandise: Stainless steel plate; nickel steel plate
Application signed: September 11, 1998
Ruling Forwarded to PD of Customs: Chicago, August 18, 1999
Effect on other rulings: None
Ruling: 44–05797–000

(V) Company: Rhodia Inc.
Articles: Aspirin (acetyl-salicylic acid) products
Merchandise: Salicyclic acid
Application signed: December 8, 1999
Ruling Forwarded to PD of Customs: New York , August 27, 1999
Effect on other rulings: Successor to Rhône-Poulenc, Inc. T.D. 94–21–U (44–03729–000) under 19 U.S.C. 1313(s)
Ruling: 44–03729–001

(W) Company: Rhodia Rare Earths Inc.
Articles: Neodymium metal; neodymium metal alloys
Merchandise: Neodymium fluoride
Application signed: November 12, 1998
Ruling Forwarded to PD of Customs: New York, June 29, 1999
Effect on other rulings: Successor to Rhône-Poulenc Inc. T.D. 98–48–W (44–05387–000) under 19 U.S.C. 1313(s)
Ruling: 44–05387–001

(X) Company: Schenectady International, Inc.
Articles: Para-cumylphenol (PCP)
Merchandise: Alpha-methylstyrene (AMS) a/k/a (1-methylethenyl) benzene
Application signed: January 8, 1999
Ruling Forwarded to PD of Customs: New York, July 27, 1999
Effect on other rulings: None
Ruling: 44–05783–000

(Y) Company: Sunrider Manufacturing, L.P.
Articles: Dry flavored beverage mixtures (NUPLUS)
Merchandise: Food drink powder F008 (herbal powders)
Application signed: February 5, 1999
Ruling Forwarded to PD of Customs: Chicago, July 14, 1999
Effect on other rulings: None
Ruling: 44–05779–000

(Z) Company: Titanium Industries, Inc.
Articles: Titanium mill products; titanium fabrications
Merchandise: Titanium and titanium-alloyed ingot, billet, bar, plate and sheet
Application signed: January 19, 1999
Ruling Forwarded to PD of Customs: New York, July 9, 1999
Effect on other rulings: Terminates T.D. 84–2–X (44–05778–000)
Ruling: 44–05778–001

U.S. Customs Service

General Notices

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the quarter beginning October 1, 1999, the interest rates for overpayments will be 7 percent for corporations and 8 percent for non-corporations, and the interest rate for underpayments will be 8 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations. The interest rate applicable to underpayments is not so bifurcated.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary

of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 99–36 (*see*, 1999–35 IRB 319, dated August 30, 1999), the IRS determined the rates of interest for the first quarter of fiscal year (FY) 2000 (the period of October 1–December 31, 1999). The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (5%) plus three percentage points (3%) for a total of eight percent (8%). For corporate overpayments, the rate is the Federal short-term rate (5%) plus two percentage points (2%) for a total of seven percent (7%). For overpayments made by non-corporations, the rate is the Federal short-term rate (5%) plus three percentage points (3%) for a total of eight percent (8%). These interest rates are subject to change for the second quarter of FY–2000 (the period of January 1–March 31, 2000).

For the convenience of the importing public and Customs personnel the following list of Internal Revenue Service interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Underpayments* (percent)	*Overpayments* (percent)	*Corporate Overpayments* (Eff. 1–1–99) (percent)
Prior to 070174	063075	6 %	6 %	
070175	013176	9 %	9 %	
020176	013178	7 %	7 %	
020178	013180	6 %	6 %	
020180	013182	12 %	12 %	
020182	123182	20 %	20 %	
010183	063083	16 %	16 %	
070183	123184	11 %	11 %	
010185	063085	13 %	13 %	
070185	123185	11 %	11 %	
010186	063086	10 %	10 %	
070186	123186	9 %	9 %	
010187	093087	9 %	8 %	
100187	123187	10 %	9 %	
010188	033188	11 %	10 %	
040188	093088	10 %	9 %	
100188	033189	11 %	10 %	
040189	093089	12 %	11 %	
100189	033191	11 %	10 %	
040191	123191	10 %	9 %	
010192	033192	9 %	8 %	
040192	093092	8 %	7 %	
100192	063094	7 %	6 %	
070194	093094	8 %	7 %	
100194	033195	9 %	8 %	
040195	063095	10 %	9 %	
070195	033196	9 %	8 %	

Beginning Date	*Ending Date*	*Underpayments* (percent)	*Overpayments* (percent)	*Corporate Overpayments* (Eff. 1-1-99) (percent)
040196	063096	8 %	7 %	
070196	033198	9 %	8 %	
040198	123198	8 %	7 %	
010199	033199	7 %	7 %	6 %
040199	123199	8 %	8 %	7 %

Dated: October 18, 1999.

RAYMOND W. KELLY,
Commissioner of Customs.

[Published in the Federal Register, October 22, 1999 (64 FR 57184)]

PROPOSED COLLECTION; COMMENT REQUEST

LIEN NOTICE (CUSTOMS FORM 3485)

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Lien Notice

OMB Number: 1515–0046

Form Number: Customs Form 3485

Abstract: The Lien Notice, Customs Form 3485, enable the carriers, cartmen, and similar businesses to notify Customs that a lien exists against an individual/business for non-payment of freight charges, etc., so that Customs will not permit delivery of the merchandise from public stores or a bonded warehouse until the lien is satisfied or discharged.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals, businesses.

Estimated Number of Respondents: 2,000

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 8,497

Estimated Total Annualized Cost on the Public: N/A

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56573)]

PROPOSED COLLECTION; COMMENT REQUEST

IMPORTERS OF MERCHANDISE SUBJECT TO ACTUAL USE PROVISIONS

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Importers of Merchandise Subject to Actual Use Provisions

OMB Number: 1515–0091

Form Number: None

Abstract: The Importers of Merchandise Subject to Actual Use Provision is part of the regulation which provides that certain items may be admitted duty-free such as farming implements, seed, potatoes etc., providing the importer can proved these items were actually used as

contemplated by law. The importer must maintain detailed records and furnish a statement of use.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Individuals, Businesses.
Estimated Number of Respondents: 12,000
Estimated Time Per Respondent: 60 minutes
Estimated Total Annual Burden Hours: 12,000
Estimated Total Annualized Cost on the Public: N/A

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56573)]

PROPOSED COLLECTION; COMMENT REQUEST

PROOF OF THE USE FOR RATES OF DUTY DEPENDENT ON ACTUAL USE

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13;

44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Proof of the Use for Rates of Duty Dependent on Actual Use

OMB Number: 1515–0109

Form Number: None

Abstract: The Proof of the Use for Rates of Duty Dependent on Actual Use declaration is needed to ensure Customs control over merchandise which is duty free. The declaration shows proof of use and must be submitted within 3 years of the date of entry or withdrawal for consumption.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals, Businesses.

Estimated Number of Respondents: 10,500

Estimated Time Per Respondent: 20 minutes

Estimated Total Annual Burden Hours: 3,500

Estimated Total Annualized Cost on the Public: N/A

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56574)]

PROPOSED COLLECTION; COMMENT REQUEST

REQUIRED RECORDS FOR SMELTING AND REFINING WAREHOUSES

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Required Records for Smelting and Refining Warehouses. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Required Records for Smelting and Refining Warehouses

OMB Number: 1515–0135

Form Number: N/A

Abstract: Each manufacturer engaged in smelting or refining must file an annual statement showing any material change in the character

of the metal-bearing materials used or changes in the method of smelting or refining. Also the records must show the receipt and disposition of each shipment.

Current Actions: There are no changes to the information collection.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 15
Estimated Time Per Respondent: 85 hours
Estimated Total Annual Burden Hours: 1,325
Estimated Total Annualized Cost on the Public: $15,900

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56574)]

PROPOSED COLLECTION; COMMENT REQUEST

DECLARATION OF PERSON WHO PERFORMED REPAIRS

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13;

44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Declaration of Person Who Performed Repairs

OMB Number: 1515–0137

Form Number: None

Abstract: The Declaration of Person Who Performed Repairs is used by Customs to ensure duty-free status for entries covering articles repaired aboard. It must be filed by importers claiming duty-free status.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 10,236

Estimated Time Per Respondent: 30 minutes

Estimated Total Annual Burden Hours: 10,236

Estimated Total Annualized Cost on the Public: N/A

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56575)]

PROPOSED COLLECTION; COMMENT REQUEST

USER FEES (CUSTOMS FORM 339)

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 20, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: User Fees

OMB Number: 1515–0154

Form Number: Customs Form 339

Abstract: The User Fees, Customs Form 339, information is necessary for Customs to effectively collect fees from private and commercial vessels, private aircraft, operators of commercial trucks, and passenger and freight railroad cars entering the United States and recipients of certain dutiable mail entries for certain official services.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Businesses or other for-profit.
Estimated Number of Respondents: 200,000
Estimated Time Per Respondent: 15 minutes
Estimated Total Annual Burden Hours: 50,000
Estimated Total Annualized Cost on the Public: N/A

Dated: October 14, 1999.

J. EDGAR NICHOLS,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 20, 1999 (64 FR 56575)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 20, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO "PROSEP-A®" AND "PROSEP-G®" CHROMATOGRAPHY MEDIA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters and revocation of treatment relating to the classification of "Prosep-A®" and "Prosep-G®" chromatography media.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings and revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of "Prosep-A®" and "Prosep-G®" chromatography media, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before December 3, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of "Prosep-A®" and "Prosep-G®" chromatography media. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) 815127, dated October 6, 1995, and NY 817126, dated December 6, 1995, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY 815127, Customs ruled that "Prosep-A®" and "Prosep-G®" chromatography media were classified in subheading 3822.00.1010,

HTSUS, the provision for "[c]omposite diagnostic or laboratory reagents * * * [c]ontaining antigens or antisera: [c]ontaining methyl chloroform (1,1,1-trichloromethane) or carbon tetrachloride." NY 817126 amended NY 815127 at the ten digit level such that "Prosep-A®" and "Prosep-G®" chromatography media were classified in subheading 3822.00.1090, HTSUS, as "[c]omposite diagnostic or laboratory reagents. * * * [c]ontaining antigens or antisera: [o]ther." NY 815127 and NY 817126 are set forth as attachments A and B, respectively, to this document.

After review and consideration of NY 815127 and NY 817126, we are of the opinion that "Prosep-A®" and "Prosep-G®" chromatography media do not fall within subheading 3822.00.1010, HTSUS or subheading 3822.00.1090, HTSUS. Rather they are classifiable in subheading 3822.00.5090, HTSUS, which provides for diagnostic or laboratory reagents other than those containing antigens or antisera.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY 815127 and NY 817126, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963035 (*see* Attachment C" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: October 14, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 6, 1995.

CLA–2–38:R:N2:238 815127
Category: Classification
Tariff No. 3822.00.1010 and 3822.00.5090

DAVID M. MURPHY, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Avenue
New York, NY 10167–0002

Re: The tariff classification of Prosep® affinity chromatography media, in bulk form, from England.

DEAR MR. MURPHY:

In your letter dated September 22, 1995, on behalf of your client, Bioprocessing Ltd., you requested a tariff classification ruling.

The subject products, Prosep-A®, Prosep-G®, Prosep-Thisorb®, Prosep-Thisorb-M®, Prosep-Remtox®, Prosep®-Lysine, Prosep®-Heparin, and Prosep®-Gelatin, consist of microporous glass beads onto which various substances, referred to as "affinity ligands", have been immobilized. You indicate in your letter that an impure input solution containing the substance to be isolated is made to pass through the appropriate Prosep® product, resulting in the affinity ligand attaching to the substance which is to be extracted from the solution. Prosep-A®, Prosep-G®, Prosep-Thisorb®, and Prosep-Thisorb-M® are used for the purification of antibodies; Prosep-Remtox® is used for the removal of endotoxins from substances such as antibiotics, vitamins, and proteins; Prosep®-Lysine uses immobilized lysine for the purification of plasminogen and tPA from plasma; Prosep®-Heparin uses immobilized heparin for the purification of clotting factors; and Prosep®-Gelatin uses immobilized gelatin for purifying fibronectins.

With respect to Prosep-A®, Prosep-G®, Prosep-Thisorb®, and Prosep-Thisorb-M®, we are of the opinion that the affinity ligand portion of each of these products acts in the capacity of an "antigen" to which the immunoglobulins bind.

The applicable subheading for Prosep-A®, Prosep-G®, Prosep-Thisorb®, and Prosep-Thisorb-M® will be 3822.00.1010, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Composite diagnostic or laboratory reagents, other than those of heading 3002 or 3006: Containing antigens or antisera." The rate of duty will be free. The applicable subheading for Prosep-Remtox®, Prosep®-Lysine, Prosep®-Heparin, and Prosep®-Gelatin will be 3822.00.5090, HTS, which provides for: "Composite diagnostic or laboratory reagents, other than those of heading 3002 or 3006: Other: Other." The rate of duty will be 4 percent ad valorem.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 6, 1995.

CLA–2–38:RR:NC:FC:238 817126
Category: Classification
Tariff No. 3822.00.1090

DAVID M. MURPHY, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Avenue
New York, NY 10167–0002

Re: The tariff classification of Prosep-A®, Prosep-G®, Presep-Thisorb®, and Prosep-Thisorb-M® affinity chromatography media, in bulk form, from England.

DEAR MR. MURPHY:

This ruling letter serves to amend NY 815127, dated October 6, 1995, which was issued to you, on behalf of your client, Bioprocessing Ltd. In that ruling, we inadvertently indicated the statistical suffix for Prosep-A®, Prosep-G®, Prosep-Thisorb®, and Prosep-Thisorb-M® to be "10", when, in fact, it should actually have been shown as "90".

Accordingly, the applicable subheading for Prosep-A®, Prosep-G®, Prosep-Thisorb®, and Prosep-Thisorb-M® will be 3822.00.1090, Harmonized Tariff Schedule of the United States

(HTS), which provides for: "Composite diagnostic or laboratory reagents, other than those of heading 3002 or 3006: Containing antigens or antisera: Other." The rate of duty will be free.

Please be advised that all other information contained in NY 815127 remains unchanged.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling or the control number indicated above should be provided, along with a copy of NY 815127, with the entry documents filed at the time this merchandise is imported.

If you have any auestions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963035 MGM
Category: Classification
Tariff No. 3822.00.5090

DAVID M. MURPHY, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Avenue
New York, NY 10167–0002

Re: Prosep® affinity chromatography media; NY 815127; NY 817126.

DEAR MR. MURPHY:

This office has determined that New York Ruling Letter (NY) 815127, dated October 6, 1995, issued to you on behalf of Bioprocessing Ltd., concerning the tariff classification of several affinity chromatography media, is partially in error. That ruling classified Prosep-A® and Prosep-G® chromatography media, as well as several other types of chromatography media, in subheading 3822.00.1010, Harmonized Tariff Schedule of the United States (HTSUS), as "[d]iagnostic or laboratory reagents on a backing * * *: containing antigens or antisera: [c]ontaining methyl chloroform (1,1,1-trichloromethane) or carbon tetrachloride." NY 815127 was later amended by NY 817126, dated December 5, 1995, which advised you that the incorrect statistical suffix was provided and therefore these items were reclassified in subheading 3822.00.1090, HTSUS. This provision differs from subheading 3822.00.1010, HTSUS, in that it is for merchandise "other" than that containing methyl chloroform (1,1,1-trichloromethane) or carbon tetrachloride.

Upon review of NY 815127, as amended by NY 817126, Customs has concluded that Prosep-A® and Prosep-G® chromatography media are properly classified in subheading 3822.00.5090, HTSUS, the provision for "[d]iagnostic or laboratory reagents on a backing * * *: [o]ther: [o]ther."

Facts:

Prosep-A® and Prosep-G® chromatography media consist of fine, porous high silica glass beads to which protein A or protein G ligands, respectively, have been affixed. Protein A and protein G ligands bind selectively to immunoglobulin G such that they are useful in column separation processes. Protein G ligand binds more efficiently to bovine, goat, and sheep immunoglobulin G than does protein A.

Immunoglobulin G is an antibody which is produced as part of the body's immune response to the presence of certain foreign bodies called antigens (antibody generators). Immunoglobulin G binds to the antigen thereby identifying it as a target for immunological

attack. Immunoglobulin G is also capable of binding to protein A and protein G. However, it does not bind to protein A or protein G in the same manner as it would bind to an antigen. It is the crystallizable fragment (Fc) portion of immunoglobulin G which binds to protein A and protein G, while the antigen-binding fragments (Fab) of immunoglobulin G bind with compatible antigens. Neither protein A nor protein G stimulates the immune response.

Issue:

Is protein A or protein G an antigen such that protein A based chromatography media are diagnostic or laboratory reagents containing antigens of subheading 3822.00.10, HTSUS?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 815127, as amended by NY 817126, Prosep-A® and Prosep-G® chromatography media were classified in subheading 3822.00.10, HTSUS, as diagnostic or laboratory reagents containing antigens. An antigen is "any substance which is capable, under appropriate conditions, of inducing a specific immune response and of reacting with the products of that response." *Dorland's Medical Dictionary*, 27th ed., 1988. Protein A and protein G are somewhat similar to antigens in that each binds to an antibody, immunoglobulin G, however they do not induce an immune response and do not bind to the antigen-binding fragments of immunoglobulin G. Thus, neither protein A nor protein G is an antigen. See Headquarters Ruling Letter 962429, dated October 13, 1999, for a similar ruling.

Holding:

Protein A and protein G based chromatography media, including Prosep-A® and Prosep-G® chromatography media, are classified in subheading 3822.00.5090, HTSUS, as diagnostic or laboratory reagents not containing antigens or antisera.

NY 815127 and NY 817126 are modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO CLASSIFICATION OF BATTERED CHEESE PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letters and treatment relating to the classification of battered cheese products.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two ruling letters pertaining to the tariff classification of battered cheese products and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before December 3, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–927–1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported

merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two ruling letters pertaining to the tariff classification of battered cheese products. Although in this notice Customs is specifically referring to two rulings, DD 800149 and HQ 081515, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In DD 800149, dated July 21, 1994, the classification of a product commonly referred to as frozen battered Mozzarella cheese sticks was determined to be in subheading 2106.90.4950, HTSUS, which provides for food preparations not elsewhere specified or included * * *, containing over 5.5% butterfat and not packaged for retail sale, other, other. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has reviewed the ruling and determined that the classification is in error and that the proper classification is in subheading 0406.90.9500, HTSUS which provides for other cheeses, and substitutes for cheese, including mixtures of the above: other, including mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63): other: other: containing cow's milk (except soft-ripened cow's milk cheese): described in additional U.S. note 16 to this chapter and entered pursuant to its provisions. If entered without an appropriate import license, issued to the

importer by the U.S. Department of Agriculture, the product is classifiable in subheading 0406.90.9700, HTSUS, which provides for such cheese entered outside of the quota described in additional U.S. note 16 to this chapter.

In HQ 081515, dated March 22, 1989, battered cheddar cheese balls or cubes and battered Mozzarella cheese sticks were classified in subheading 2106.90.4000, HTSUS which provides for other food preparations not elsewhere specified or included: containing over 5.5% by weight of butterfat and not packaged for retail sale. This ruling is set forth in "Attachment B" to this document. Customs has reviewed that ruling and determined that the proper classification for the battered cheddar cheese balls or cubes is in subheading 0406.90.0890, HTSUS, which provides for other cheese: cheddar cheese: described in additional U.S. note 18 to this chapter and entered pursuant to its provisions, other. If entered without an appropriate import license, issued to the importer by the U.S. Department of Agriculture, the product is classifiable in subheading 0406.90.1200, HTSUS, which provides for such cheese entered outside of the quota described in additional U.S. note 18 to this chapter, and the proper classification for the battered Mozzarella cheese sticks is in subheading 0406.90.9500/9700, HTSUS.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke DD 800149, HQ 081515, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letters (HQ) 962223 and 963175 (*see* Attachments "C" and "D" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: October 15, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Ogdensburg, NY, July 21, 1994.

CLA–2–21:S:N:N:E01
Category: Classification
Tariff No. 2106.90.4950

MR. COREY SIGUT
OXFORD FROZEN FOODS
Main St., P.O. Box 220
Oxford, N.S. B0M 1P0

Re: The tariff classification of Frozen Battered Mozzarella Cheese Sticks from Canada.

DEAR MR. SIGUT:

In your letter dated July 13, 1994 you requested a tariff classification ruling.

The article to be classified is described as a Frozen Battered Mozzarella Cheese Stick intended to be sold in two pound bags, six per case, as an institutional product. The product is composed of low fat Mozzarella cheese and coated with a batter composed of wheat flour, toasted wheat cherubs, corn flour, starch, sugar, salt, and small quantities of other ingredients.

The applicable tariff provision for the FROZEN BATTERED MOZZARELLA CHEESE STICKS will be 2106.90.4950 Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for food preparations not elsewhere specified or included * * *, containing over 5.5% butterfat and not packaged for retail sale, other, other. The general rate of duty will be 16% ad valorem.

A copy of this ruling letter should be attached to the entry documents at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

STEPHEN LEPAGE,
(for William Dietzel,
District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, March 22, 1989.

CLA–2 CO:R:C:G 081515 JGH
Category: Classification
Tariff No. 2106.90.40

DAVID O. ELLIOTT, ESQ.
BARNES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: Classification of battered cheese products under the Harmonized Tariff Schedule (HTS).

DEAR MR. ELLIOTT:

This is in reference to your submissions on the classification of battered cheese products from Canada.

Facts:

The products are battered cheddar cheese balls or cubes and battered mozzarella cheese sticks. The cheese balls are said to be about one inch in diameter, 55.6 percent by weight of batter and 44.4 percent by weight cheddar cheese. The mozzarella sticks are said to be

about 3 inches in length and ¾ inch in diameter and to consist of 54.5 percent by weight of batter and 45.5 percent by weight mozzarella cheese. A Customs laboratory examination of samples of the products described the cheese balls as consisting of 59 percent coating by weight and 41 percent cheese, and the sticks to consist of 52.5 percent cheese and 47.5 percent coating. It is asserted that the manufacturer is employing quality control measures to insure that the batter content is more than 50 percent by weight. The coating is said to consist of wheat flour, toasted wheat crumbs, soya flour, corn flour, grated romano cheese, seasonings, and preservatives. The products are said to wrapped in a "tempura-lite" batter and then oil blanched and frozen. They are prepared by pan frying, deep frying or oven baking. They will be imported in non-retail size packages sale to the institutional trade.

Issue:

Whether the mozzarella sticks are classifiable as other cheese containing cow's milk in subheading 0406.90.8060, HTS, and the coated cheddar cheese balls as other cheddar cheese in subheading 0406.90.1040, HTS, or whether the products are classifiable as other food preparations, not elsewhere specified or included: Containing over 5.5 percent by weight of butterfat and not packaged for retail sale, in subheading 2106.90.40, HTS.

Law and Analysis:

In support of classification of the battered cheese products under the cheese provisions, it is argued that the products, even though coated, are essentially cheese; that the material which gives the product its dominant flavor is cheese. Following (General Rules of Interpretation) GRI 3(b), it is claimed the basic character, cheese, has not been changed by the addition of batter. Under GRI 3(b), it is asserted, the essential nature of the product may be determined by the nature of the principal material or component, its quantity, bulk, weight or value, and the role of the constituent material in relation to the use of the goods. Heading 2106 HTS, would only be considered in the event a more specific provision is not available. Heading 0406.90, HTS, for cheese, it is felt, is more specific and would apply to a cheese product such as this whether or not combined with other ingredients.

It is your position that since the products are cheese wrapped in "tempura-lite" seasoned batter, which is then oil blanched and frozen, the result is an appetizer, hors d'oeuvres or snack, which is cooked before consuming, that such a processing creates a new product which is most specifically described, following GRI 3(a), in subheading 2106.90.40, HTS, as a food preparation containing over 5.5 percent by weight butterfat. In the explanatory notes to 2106, you note, there are examples of food preparations which include significant amounts of dairy products, such as preparations based on butter or other fats, or foodstuffs of flour sugar, milk powder, etc. Another example cited is from the "Explanatory Notes to the Combined Nomenclature of the European Community", in which cheese fondues are mentioned. They are described as a core of cheese surrounded by bread crumbs and were considered as food preparations. Therefore, subheading 2106.90.40 is said to be the most specific provision for these battered cheese products.

The products are essentially bite-size snack foods and therefore can be readily distinguished from the larger cheese products such as cheese balls which are seasoned. In fact, the explanatory notes to heading 0406 mention that the presence of meat, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification provided that the goods retain the character of cheese. From the small size of the products and the amount of coating each product has, it is not believed that they contain commercially extractable butterfat.

Customs has previously considered the classification of a cheese product similar to these. In ruling 014958 of May 17, 1972, the issue was the classification of "cheese footballs," described as small spherical cheese-filled biscuits/cookies. The products were classified as edible preparations in item 182.95, TSUS. They were not subject to quota restraints, since the butterfat content was not felt to be commercially extractable and as finished articles they were not considered suitable for use as ingredients in the commercial production of other edible articles.

Another factor considered by Customs in the classification of products such as this, is the thickness of the coating. In *Hilo Rice Mill Co., Ltd., American Customs Brokerage Company v. United States,* C.A.D. 866, the classification of coated peanuts was considered. The court noted the coating appeared to be the thickness of the diameter of the peanut. The product was classifiable as a baked good, rather than as peanuts. In contrast, in another case, peanuts with thin, brittle coatings were still considered as peanuts for classification purposes.

In arguing that the products are cheese, it is apparently believed that a distinction may be drawn between such earlier decisions and the current issues brought under the HTS, because of new concepts such as "essential character." Under the GRI's the first two rules concern the classification of merchandise according to the applicable HTS headings. It is therefore contended that the provisions for cheese provide for a product such as this. However, these battered cheese products are something more than a seasoned cheese. In view of the method in which the battered cheese products are produced, they are not merely mixtures but are more accurately described as "preparations for use, either directly or after processing (such as by cooking, dissolving, boiling in water, milk, for human consumption", as described in the explanatory notes for 2106, HTS.

Holding:

Battered cheese products, bite-size snack foods, which are processed food products consisting of a small amount of cheese covered with a batter which is thicker by weight than the cheese component and which do not contain any extractable butterfat and are not suitable for use as ingredients in the commercial production of edible articles, are classifiable under the provision for other food preparations not elsewhere specified or included: containing over 5.5 percent by weight of butterfat and not packaged for retail sale, in subheading 2106.90.40, HTS. The rate of duty is 16 percent ad valorem.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962223ptl
Category: Classification
Tariff No. 0406.90.9500 and 0406.90.9700

MR. COREY SIGUT
OXFORD FROZEN FOODS
Main Street, P.O. Box 220
Oxford, N.S. B0M 1P0 Canada

Re: Frozen Battered Mozzarella Cheese Sticks; DD 800149 revoked.

DEAR MR. SIGUT:

This is in reference to DD 800149, issued to you on July 21, 1994, in response to your letter to the District Director of Customs in Ogdensburg, New York, dated July 13, 1994, requesting a ruling on the classification of frozen mozzarella cheese sticks under the Harmonized Tariff Schedule of the United States (HTSUS). In DD 800149, the frozen mozzarella cheese sticks were classified in subheading 2106.90.4950, HTSUS, which provides for food preparations not elsewhere specified or included * * *, containing over 5.5% butterfat and not packaged for retail sale, other, other.

We have reviewed DD 800149 and determined that an error was made in the classification. This ruling revokes DD 800149 and sets forth the correct classification for frozen mozzarella cheese sticks.

Facts:

The Battered Mozzarella Cheese Sticks are composed of low fat Mozzarella cheese, approximately 45% by weight; coated with a batter composed of wheat flour, toasted wheat crumbs, corn flour, starch, sugar, salt, baking powder, Romano cheese, onion powder, spices, guar gum, garlic powder, whey powder, oil, dehydrated parsley and are prefried in vegetable oil. The product is packed in a printed two pound poly bag, six per case, and is intended to be sold as an institutional product for restaurant use.

Issue:

What is the classification of frozen battered Mozzarella cheese sticks?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

0406	Cheese and curd
* * * * * * *	
0406.90	Other cheese
* * * * * * *	
	Other cheeses, and substitutes for cheese, including mixtures of the above:
	Other, including mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63):
	Other:
* * * * * * *	
	Other:
	Containing cow's milk (except soft-ripened cow's milk cheese):
0406.90.9500	Described in additional U.S. note 16 to this chapter and entered pursuant to its provisions.
0406.90.9700	Other.
* * * * * * *	
2106	Food preparations not elsewhere specified or included:
2106.90	Other:
* * * * * * *	
	Other:
2106.90	Containing over 10 percent by weight of milk solids:
* * * * * * *	
	Other dairy products described in additional U.S. note 1 to chapter 4:
2106.90.6400	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions.
2106.90.6600	Other.

EN 04.06 states that: "Cheeses which have been coated with batter or bread crumbs remain classified in this heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese."

Initially, we must determine whether the battered cheese sticks have the character of cheese. If they have the character of cheese, they are classifiable as cheese in heading 0406, HTSUS. If they do not, they will be classified as food preparations not elsewhere specified or included in heading 2106, HTSUS.

Because the breaded cheese sticks are goods consisting partly of cheese and partly of other food components they may not be classified solely on the basis of GRI 1. The cheese and batter products under consideration are described in GRI 2(b) which covers mixtures and combinations of materials and substances and goods consisting of two or more materials and substances. According to GRI 2(b), "The classification of goods consisting or more than one material or substance shall be according to the principles of Rule 3." The ingredients of the breaded cheese sticks present us with a composite good for classification purposes. GRI

3(b) governs the classification of mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale. Under GRI 3(b), classification of the breaded cheese sticks is to be determined on the basis of the component which gives them their essential character. The EN's provide that, if this rule applies, goods shall be classified as if they consisted of the material or component which gives them their essential character. EN Rule 3(b)(VIII) lists as factors to help determine the essential character of such goods the nature of the materials or components, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods.

Recently, there have been several Court decisions on "essential character" for purposes of GRI 3(b). These cases have looked primarily to the role of the constituent materials or components in relation to the use of the goods to determine essential character. See, *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), affirmed 119 F.3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co., v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995). See also, *Pillowtex Corp. v. United States*, 983 F. Supp. 188 (CIT 1997), affirmed CAFC No. 98–1227 (March 16, 1999).

Based on the foregoing, we conclude that in an essential character analysis for purposes of GRI 3(b), the role of the constituent materials or components in relation to the use of the goods is generally of primary importance, but the other factors listed in EN Rule 3(b)(VIII) should also be considered, as applicable. In this case, the "indispensable function" (*Better Home Plastics, supra*) of the breaded cheese stick product is that it is served as a food product appetizer. The cheese is the component that distinguishes this breaded product from other breaded products. This criterion indicates that the essential character of the good is provided by the cheese component. Insofar as the other factors (quantity, bulk, weight, and value) are concerned, the value aspect of the cheese relative to the value of the other components, appears to support the position that the cheese component provides the essential character of the article. We conclude that the essential character of the product is provided by the cheese component so that, under GRI 3(b), the breaded cheese sticks are classifiable in heading 0406, HTSUS.

Holding:

Frozen battered Mozzarella cheese sticks are classified in subheading 0406.90.9500, HTSUS, which provides for Other cheeses, and substitutes for cheese, including mixtures of the above: other, including mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63): other: other: containing cow's milk (except soft-ripened cow's milk cheese): described in additional U.S. note 16 to this chapter and entered pursuant to its provisions. If entered without an appropriate import license, issued to the importer by the U.S. Department of Agriculture, the product is classifiable in subheading 0406.90.9700, HTSUS, which provides for such cheese entered outside of the quota described in additional U.S. note 16 to this chapter.

DD 800149, issued July 21, 1994, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 963175ptl
Category: Classification
Tariff No. 0406.90.0890/1200
and 0406.90.9500/9700

DAVID O. ELLIOTT, ESQ.
BARNES, RICHARDSON & COLBURN
465 Park Avenue South
New York, NY 10016

Re: Battered Cheese Products; HQ 081515 revoked.

DEAR MR. ELLIOTT:

This is in reference to HQ 081515, issued to you on behalf of Olmstead Foods Limited, on March 22, 1989, which classified battered cheddar cheese balls or cubes and battered mozzarella cheese sticks in subheading 2106.90.40, Harmonized Tariff Schedule of the United States (HTSUS) which provides for other food preparations not elsewhere specified or included: containing over 5.5% by weight of butterfat and not packaged for retail sale.

We have reviewed HQ 081515 and have determined that an error was made in the classification of the products. This ruling revokes HQ 081515 and sets forth the correct classification for battered cheddar cheese balls or cubes and battered mozzarella cheese sticks.

Facts:

The products are battered cheddar cheese balls or cubes and battered mozzarella cheese sticks. The cheese balls are said to be about one inch in diameter, 55.6% by weight of batter and 44.4% by weight cheddar cheese. The mozzarella sticks are said to be about 3 inches in length and ¾ inch in diameter and to consist of 54.5% by weight of batter and 45.5% by weight mozzarella cheese. A Customs laboratory examination of samples of the products described the cheese balls as consisting of 59% coating by weight and 41% cheese, and the sticks to consist of 52.5% cheese and 47.5% coating (Lab. No. 2-86-12274-001, dated 10/10/86). It is asserted that the manufacturer is employing quality control measures to insure that the batter content is more than 50% by weight. The coating is said to consist of wheat flour, toasted wheat crumbs, soya flour, corn flour, grated romano cheese, seasonings, and preservatives. The products are said to be wrapped in a "tempura-lite" batter and then oil blanched and frozen. They are prepared by pan frying, deep frying or oven baking. They will be imported in non-retail size packages for sale to the institutional trade.

Issue:

What is the classification of battered cheese products?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

0406	Cheese and curd						
*	*	*	*	*	*	*	
0406.90	Other cheese						
*	*	*	*	*	*	*	

	Cheddar cheese:
* * * * * * *	
0406.90.08	Described in additional U.S. note 18 to this chapter and entered pursuant to its provisions.
* * * * * * *	
0406.90.0890	Other:
0406.90.1200	Other:
* * * * * * *	
	Other cheeses, and substitutes for cheese, including mixtures of the above (con.):
	Other, including mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63):
	Other:
	Containing cow's milk (except soft-ripened cow's milk cheese):
0406.90.9500	Described in additional U.S. note 16 to this chapter and entered pursuant to its provisions.
0406.90.9700	Other.
* * * * * * *	
2106	Food preparations not elsewhere specified or included:
2106.90	Other:
* * * * * * *	
	Other:
2106.90	Containing over 10 percent by weight of milk solids:
* * * * * * *	
	Other dairy products described in additional U.S. note 1 to chapter 4:
2106.90.6400	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions.
2106.90.6600	Other.

In HQ 081515, Customs discussed prior rulings issued under the Tariff Schedules of the United States, the predecessor to the HTSUS, in which factors such as butterfat content and the thickness of a coating of an article were found to be controlling reasons for not classifying articles under cheese provisions. HQ 081515 concluded by stating that the battered cheese products were "something more than a seasoned cheese" and thus should be classified in heading 2106, HTSUS.

We believe that the rationale followed in HQ 081515 is flawed. Because the battered cheddar cheese balls or cubes and battered mozzarella cheese sticks are goods consisting partly of cheese and partly of other food components they may not be classified solely on the basis of GRI 1. The cheese and batter products under consideration are described in GRI 2(b) which covers mixtures and combinations of materials and substances and goods consisting of two or more materials and substances. According to GRI 2(b), "The classification of goods consisting or more than one material or substance shall be according to the principles of Rule 3."

GRI 3(a) states that the heading which provides the most specific description shall be preferred to headings providing a more general description. GRI 3(b) states mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The EN's provide that, if this rule applies, goods shall be classified as if they consisted of the material or component which gives them their essential character. EN Rule 3(b)(VIII) lists as factors to help determine the essential character of such goods the nature of the materials or components, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods. Therefore, under GRI 3(b), classification of the battered cheddar cheese balls or cubes and battered mozzarella cheese sticks is to be determined on the basis of the component which gives them their essential character.

Recently, there have been several Court decisions on "essential character" for purposes of GRI 3(b). These cases have looked primarily to the role of the constituent materials or components in relation to the use of the goods to determine essential character. See, *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), affirmed 119 F.3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co., v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995). See also, *Pillowtex Corp. v. United States*, 983 F. Supp. 188 (CIT 1997), affirmed CAFC No. 98–1227 (March 16, 1999).

Based on the foregoing, we conclude that in an essential character analysis for purposes of GRI 3(b), the role of the constituent materials or components in relation to the use of the goods is generally of primary importance, but the other factors listed in EN Rule 3(b)(VIII) should also be considered, as applicable. In this case, the "indispensable function" (*Better Home Plastics, supra*) of the battered cheddar cheese balls or cubes and battered mozzarella cheese stick product is that they are served as a food product appetizer. The cheese is the component that distinguishes this breaded product from other breaded products. This criterion indicates that the essential character of the good is provided by the cheese component. Insofar as the other factors (quantity, bulk, weight, and value) are concerned, the value aspect of the cheese relative to the value of the other components, appears to support the position that the cheese component provides the essential character of the article. We conclude that the essential character of the product is provided by the cheese component so that, under GRI 3(b), the battered cheddar cheese balls or cubes and battered mozzarella cheese sticks are classifiable in heading 0406, HTSUS.

This result is reinforced by EN 04.06 which states that: "Cheeses which have been coated with batter or bread crumbs remain classified in this heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese." Although the specific language of this EN was adopted after HQ 081515 was issued, the premise underlying the EN existed and was actually cited in the ruling.

Holding:

Battered Mozzarella cheese sticks are classified in subheading 0406.90.9500, HTSUS, which provides for Other cheeses, and substitutes for cheese, including mixtures of the above: other, including mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63): other: other: containing cow's milk (except soft-ripened cow's milk cheese): described in additional U.S. note 16 to this chapter and entered pursuant to its provisions. If entered without an appropriate import license, issued to the importer by the U.S. Department of Agriculture, the product is classifiable in subheading 0406.90.9700, HTSUS, which provides for such cheese entered outside of the quota described in additional U.S. note 16 to this chapter.

The battered cheddar cheese balls or cubes are classified in subheading 0406.90.0890 which provides for Other cheese: Cheddar cheese: described in additional U.S. note 18 to this chapter and entered pursuant to its provisions, other. If entered without an appropriate import license, issued to the importer by the U.S. Department of Agriculture, the product is classifiable in subheading 0406.90.1200, HTSUS, which provides for such cheese entered outside of the quota described in additional U.S. note 18 to this chapter.

HQ 081515, issued March 22, 1989 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO *BONA FIDE* EXPORTATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and treatment relating to a *bona fide* exportation.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying a ruling pertaining to expanding the definition of a *bona fide* exportation from the United States, to include the sale of rejected merchandise to a foreign seller, who takes merchandise to a foreign country, where it is processed and recovered. Comments were requested on the proposed modification in the CUSTOMS BULLETIN of September 8, 1999, Vol. 33, No. 35/36. No comments were received.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 3, 2000.

FOR FURTHER INFORMATION CONTACT: Christina Kopitopoulos, Duty and Refund Determination Branch, (202) 927–3325.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on September 8, 1999, Vol. 33, No. 35/36, proposing to modify unpublished Ruling Number 226620, dated August 28, 1996, which held that a bona fide exportation had not occurred when merchandise was exported outside the United States to a foreign country for destruction.

As stated in the proposal, this modification will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advise Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 625(c)(2)), Customs is modifying any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar issue, or the importer's or Customs previous interpretation of volume 19 U.S.C. 1313. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In unpublished Ruling Letter 226620, dated August 28, 1996, exportation was defined as a "severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country." 17 Op. Atty. Gen. 579 (1883) and 19 CFR 101.1(k). The ruling also stated "an opinion of the Attorney General, published as T.D. 36932, January 16, 1917, held that shipping merchandise out of the United States for destruction does not constitute an export for drawback purposes." The Attorney General decision relied on the finding that "the courts have almost uniformly construed the words 'export' and 'exportation,' 'import,' 'importation,' as embodying the idea of introduction of merchandise into a country for consumption, use, or sale. Furthermore, the ruling states that the purpose of drawback has always been to encourage American commerce or manufacturing, or both; and to allow the American manufacturer to compete in foreign markets, without the handicap of including in his costs, and consequently in his sales price, the duty paid on the imported merchandise. The ruling concludes that sending a U.S.-made drug to a foreign country for purposes of reclaiming the original imported material is not an exportation since the merchandise is not to be introduced into that country for consumption, use or sale.

Upon further review Customs determined that where merchandise is sent to a foreign country to be processed by extraction, and some of the constituent ingredients are intended for subsequent use, the requisite intent to join that merchandise to the foreign country is sufficient to find an "exportation." The extraction of an ingredient for further use is a process that is distinguishable from destruction which purpose is to eliminate the destroyed material as an article of commerce. In addition, since 1917 Congress amended the statute to specifically allow "destruc-

tion" in lieu of exportation in 19 U.S.C. 1313(b). Since 1993, destruction has been a viable option to exportation under the drawback statutes, which undercuts the concerns expressed in the 1917 Attorney General's opinion specifically regarding the protection and advancement of American manufacturing in foreign and domestic markets.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying unpublished Ruling Letter 226620, and other ruling not specifically identified on identical or substantially similar transactions to reflect the expanded definition of *bona fide* exportation to include a foreign purchaser, who sends merchandise to a foreign country for purposes of processing and recovery of a U.S.-made drug pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 228028 (*see* "Attachment " to this document).

Dated: October 19, 1999.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 19, 1999.

RR:CR:DR 228028 CK CSC
Drawback

KAREN P. BINDER, ESQ.
ASSISTANT CHIEF COUNSEL
U.S. CUSTOMS SERVICE
INTERNATIONAL TRADE LITIGATION STAFF
26 Federal Plaza, Room 258
New York, NY 10278

DEAR MS. BINDER:

We are writing in response to your request for the reconsideration of the drawback eligibility of claims by Knoll Pharmaceutical Company which we denied in Customs Headquarters Ruling Letter 226620, dated August 28, 1996. The request for drawback under § 1313(b) was denied based on the determination that a *bona fide* exportation did not exist. We find your request and reasoning for reconsideration persuasive.

HQ 226620 denied the drawback claims based on the conclusion that a *bona fide* exportation had not occurred. This conclusion was based on Atty Gen'l Opin., 19 Vol. 31, October 24, 1916, also published as T.D. 36935, January 16, 1917. We agree with your argument that the Attorney General's opinion is not dispositive of the present action. We agree for two reasons. First, the holding is distinguishable, the Attorney General found that a drawback is not allowable on cigarettes manufactured in the United States from imported Turkish tobacco for domestic trade, and which have been recalled from domestic trade, after having become deteriorated or unsalable, and then shipped abroad, not for use in the commerce of any foreign country, but for the purpose of destruction.

In the present action, Knoll sent its pharmaceutical tablets (Isoptin and Rythmol tablets), which were manufactured domestically, to its parent company in Germany where it is

alleged that the original raw material was reclaimed and recycled from the tablets. Knoll has stated at different times that the tablets were rejected because they did not meet quality control specifications (background to the ruling letter), and they were "out-of-date" and no longer usable (complaint). While there was no intent to sell the tablets, there was intent to salvage and recycle the tablets for re-use in Germany. Knoll's intent was to ship the tablets to Germany, and use as much of the recyclable ingredients as possible, in the manufacture of new pharmaceuticals.

Furthermore, we find your use of case law persuasive in defining export and intent to export, which is on point for the case at issue. Such case law includes: *United States v. National Sugar Refining*, 39 C.C.P.A. 96 (1951), where the court held that an exportation occurred because the imported had the intent to unite its goods with those of the foreign country. *F.W. Myers & Co. v. United States*, 29 Cust. Ct. 202, C.D. 1468 (1952), where the court found that merchandise sent from the United States to Canada, where it was refused entry and did not mingle with the mass of things in the foreign country, was nonetheless an exportation since there was intent for the merchandise to do so. *See also, Swan & Finch Co. v. United States*, 190 U.S. 143 (1903), where the court stated that another country or State as the intended destination of the goods is essential to the idea of exportation.

Therefore, we believe that the case in action is distinguishable from the Attorney General's opinion, since the pharmaceutical tablets were intended to be sent to Germany, for the purpose of reclamation and recycling rather than simple destruction. Following the holdings of the cases cited above, intent to "export" can be found by the intention to recycle and reclaim. This is significant because there is intent to re-use ingredients from the tablets, combine them with German ingredients, to form a new pharmaceutical. Hence, Knoll has shown that the recyclable ingredients in the tablets are meant to be combined or "mingled," with ingredients in a foreign land, and that has been found, by the court, to be sufficient to find an "exportation."

Alternately, a second reason that the Attorney General's opinion is not persuasive, is it's inapplicability to the modern drawback statutes. In that opinion, destruction for purposes of drawback was categorically denied, it was argued that allowing destruction would contravene Congressional intent, and the purpose and spirit of what Congress intended to enact, namely, the collection of revenue, and advancement for American manufacturer's in foreign markets. In 1917, we have no doubt that the Attorney General's opinion was in keeping with the original legislative intent of the statute. However, legislative intent is not static, and it will evolve to reflect and compliment the business world it regulates. An expression of the inadequacy of the drawback statutes can be found in the legislative history of section 313, in H.R. 7, 71st Cong. 1st sess., 161 (May 9, 1929), where legislative intent was already shifting to accommodate the growth of the American manufacturer's involvement in foreign markets. More importantly though, is the legislative shift that is reflected in the addition of "destruction" to § 1313(b), beginning in 1993. Since 1993 destruction has been a viable option to exportation under the drawback statutes, which shows that the concerns expressed in 1917, specifically regarding the protection and advancement of American manufacturing in foreign and domestic markets, are no longer valid considerations. Therefore, we believe that even if the Attorney General's opinion was on point, we believe that amendments in the drawback statutes in the last 180 years have adequately addressed and resolved the concerns expressed therein.

In conclusion, we find your arguments persuasive for the reasons stated above, and agree that the pursuit of this action will lead to an anomalous resolution. As such, as far as the drawback claims were denied because there was no *bona fide* exportation, we reverse our decision.

Unpublished Ruling Letter 226620, dated August 28, 1996, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A SWEETENING PRODUCT KNOWN AS LC SUGAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter and the revocation of treatment relating to the classification of a sweetening product known as LC Sugar.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling letter (NYRL), C85738, dated April 22, 1998, and is revoking any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of a sweetening product known as LC Sugar, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published in the CUSTOMS BULLETIN, Vol. 33, No. 35/36, dated September 8, 1999. One comment was received in response to the notice, but it did not address the substantive issue.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch (202) 927–1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises

interested parties that Customs is revoking NYRL C85738 pertaining to the tariff classification of a sugar sweetening product. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NYRL) C85738 dated April 22, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to that identified. No further rulings have been found. Any party who had received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of this final decision.

In NYRL C85738, Customs ruled that the a food sweetener containing 997.800g/kg. of cane sucrose, 2.150g/kg of potassium acesulfame, and 0.50g/kg of unidentified substances, was classified (by virtue of rule 3(b) of the General Rules of Interpretation (GRI), HTSUS) in subheadings 1701.99.10, and 1701.99.50, HTSUS, subject to tariff rate quotas. We are now of the opinion that the product known as LC Sugar, a white crystalline powder, consisting of sucrose with a polarimeter reading of over 99.5 degrees mixed with a small quantity of potassium acesulfame, is classified by virtue of GRI 1, in subheading 2106.90.94, HTSUS, as a food preparation not elsewhere specified or included, other articles containing over 65 percent by dry weight of sugar as described in U.S. Note 7 to Chapter 17 and entered pursuant to its provisions.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY C85738, and revoking any other ruling not specifically identified, to reflect the proper classification of the merchandise in subheading 2106.90.94, HTSUS. Headquarters Ruling Letter (HQ) 961927, revoking NYRL C85738 and reflecting the proper classification of the merchandise is set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: October 13, 1999.

MARVIN AMERNICK
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 13, 1999.

CLA-2 RR:CR:GC 961927K
Category: Classification
Tariff No. 2106.90.94

SEÑOR HECTOR ALVAREZ DE LA CADENA
PRESIDENT AND DIRECTOR
METCO, S.A. DE C.V.
Av. Tecamachalco 161
Deleg. Miquel Hidalgo
C.P. 11010 México D.F.

Re: Revocation of New York Ruling Letter (NYRL) C85738; LC Sugar.

DEAR SEÑOR ALVAREZ DE LA CANDENA:

In response to a request of March 20, 1998, from former counsel on your behalf for a tariff classification ruling, the Director, Customs National Commodity Specialist Division, New York, issued NYRL C85738, dated April 22, 1998, which held that a product described as LC Sugar, was classified in subheadings 1701.99.10 and 1701.99.50, Harmonized Tariff Schedule of the United States (HTSUS), subject to tariff rate quotas. Counsel, in a letter to Customs Headquarters dated June 12, 1998, requested that we reconsider the ruling and classify the sugar product in subheading 1702.90.90, HTSUS, not subject to tariff rate quotas. Pursuant to section 625(c), Tariff Act of 1930, an amended (19 U.S.C. 1625(c)), notice of proposed revocation of NYRL C85738 was published in the CUSTOMS BULLETIN, Vol.33, No. 35/36, dated September 8, 1999. Your letter of October 7, 1999, was the only comment received. It, however, did not address the issue and we are precluded from granting you more time to prepare additional arguments. We have considered NYRL C85738 and determined that the classification set forth is in error. The following reflects our position in this matter.

Facts:

The sugar product from Mexico is described as a white crystalline powder containing 997.800g/kg. of sucrose, 2.150g/kg. of potassium acesulfame, and 0.50g/kg. of unidentified substances. The product is further described as a low-calorie, high-intensity sweetener produced by the co-crystallization of sugar cane and potassium acesulfame. For purposes of this decision, we assume that the product is imported in bulk.

Issue:

The issue is whether the product is classified by virtue of rule 1, of the General Rules of Interpretation (GRI), HTSUS, as a food preparation not elsewhere specified or included, in subheading 2106.90.94, HTSUS.

Law and Analysis:

The classification of imported merchandise under the HTSUS is governed by the principles set forth in the GRI. GRI 1 requires that classification be determined first according

to the terms of the headings of the tariff schedule and any relative section and chapter notes and, unless otherwise required, according to the remaining GRI, taken in their appropriate order. Accordingly, we first have to determine whether the food sweetener is classified by virtue of GRI 1.

Heading 1701, HTSUS covers cane or beet sugar and chemically pure sucrose, in solid form. The subject product is a mixture of cane sucrose and potassium acesulfame. Therefore, you conclude that the product cannot be classified in subheadings 1701.99.10 and 1701.99.50, HTSUS, and should be classified in subheading 1702.90.90, HTSUS, as other sugars, including chemically pure lactose, maltose, glucose, and fructose, in solid form. We agree that under GRI 1, the product, sucrose with the addition of potassium acesulfame, is not classified in heading 1701, HTSUS.

We must next consider whether by virtue of GRI 1, the product is classified in heading 1702. Heading 1702 covers "other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups, not containing added flavoring or coloring matter; artificial honey, whether or not mixed with natural honey; [and] caramel." The product is not a sugar syrup, or artificial honey, or caramel and it is not other sugars, including chemically pure lactose, maltose, glucose and fructose. "Other sugars" covered in heading 1702 do not include cane sucrose or beet sugars. Heading 1702 does not provide for other sugars that are mixed with components such as potassium acesulfame that is classified in heading 2934, HTSUS. Accordingly, we conclude that under GRI 1, the product also is not classified in heading 1702, HTSUS.

Heading 2106, HTSUS, provides for food preparations not elsewhere specified or included. Since the sweetener is not elsewhere specified or included, heading 2106 is broad enough to cover the product as a food preparation not elsewhere specified or included. Therefore, the product is classified by virtue of GRI 1 in subheading 2106.90.94, HTSUS, as a food preparation not elsewhere specified or included, other articles containing over 65 percent by dry weight of sugar as described in U.S. Note 7 to Chapter 17 and entered pursuant to its provisions, with a 1999 general rate of duty of 29.6¢/kg + 8.8 % ad valorem. Inasmuch as this product can be classified by virtue of GRI 1, we need not consider alternative claims for classification by virtue of GRI 3(b).

Holding:

A product known as LC Sugar, a white crystalline powder, consisting of sucrose with a polarimeter reading of over 99.5 degrees mixed with a small quantity of potassium acesulfame, is classified by virtue of GRI 1, in subheading 2106.90.94, HTSUS, as a food preparation not elsewhere specified or included, other articles containing over 65 percent by dry weight of sugar as described in U.S. Note 7 to Chapter 17 and entered pursuant to its provisions.

NYRL C85738 is revoked.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO CLASSIFICATION OF CRYSTAL BLESSING CUP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter and treatment relating to the classification of a crystal blessing cup.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a crystal blessing cup and any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed modification was published on September 8, 1999, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This modification is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 3, 2000.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch, (202) 927–1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was pub-

lished on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36, proposing to modify New York Ruling Letter (NY) C88308, dated July 19, 1998, pertaining to the tariff classification of a crystal blessing cup. No comments were received in response to this notice.

In NY C88308, dated July 19, 1998, Customs ruled that a crystal blessing cup was classified in subheading 7013.21.5000, HTSUS, which provides for "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Drinking glasses, other than of glass-ceramics: Of lead crystal: Valued over $5 each." Since the issuance of that ruling, Customs has had a chance to reconsider the classification of this merchandise based on the information as to use provided by the importer and from other sources and has determined that the 1998 ruling is partially in error. We have determined that this particular crystal blessing cup is within the class of other festive articles and is properly classified in subheading 9505.90.60, HTSUS, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other" along with the Seder plate under consideration in NY C88308.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying NY C88308 and any other ruling not specifically identified, to reflect the proper classification of the merchandise, pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962128. (See the attachment to this document.)

As stated in the proposed notice, this modification covers any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is modifying any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on the treatment of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of

lack of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to effective date of this decision.

Dated: October 18, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, October 18, 1999.

CLA–2 RR:CR:GC 962128 JGB
Category: Classification
Tariff No. 9505.90.60

MR. JOEL K. SIMON
SERKO & SIMON
One World Trade Center, Suite 3371
New York, NY 10048

Re: Modification of NY C88308; Crystal Blessing Cup; *Midwest of Cannon Falls, Inc. v. United States.*

DEAR MR. SIMON:

This is in response to your letter of August 12, 1998, on behalf of Waterford Wedgewood U.S.A., Inc., which requests reconsideration of New York Ruling Letter (NY) C88308, issued June 19, 1998, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a "crystal blessing cup" manufactured in Ireland. We discussed the classification of this article with you at a meeting at Headquarters on March 17, 1999.

This letter is to inform you that C88308 no longer reflects the view of the Customs Service concerning the classification of the crystal blessing cup and that the following reflects our position for this product.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36, proposing to modify NY C88308, dated July 19, 1998. No comments were received in response to this notice.

Facts:

The crystal blessing cup is stated to have a lead monoxide content of approximately 32 percent and has a unit value of $32.26 per piece. The article, although marketed as a cup, is stemware measuring approximately 7½ inches in height. It is decorated with an engraved Star of David and, according to the informational insert, has three Hebrew words which are the last words of the blessing for wine, namely "creates the fruits of the vine."

Information provided noted that the "glass is used to celebrate various Jewish festivals such as the Passover ritual. In addition, the blessing cup may also be used during other festive Jewish occasions such as the Kiddish, Havdalah, the Rite of Circumcision, the Redemption of the First-Born, the Ceremony of betrothal, the Marriage Blessings and Grace after Meals."

Issue:

Whether the crystal blessing cup is classified in heading 7013, HTSUS, as a lead crystal drinking glass, or in heading 9505, HTSUS, as festive articles.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 7013, HTSUS, provides for "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)." Subheading 7013.21.50, HTSUS, specifically provides for "Drinking glasses, other than of glass-ceramics: Of lead crystal: Valued over $5 each."

Heading 9505, HTSUS, provides, among other things, for festive, carnival or other entertainment articles. Articles for festivities other than Christmas are specifically provided for in subheading 9505.90, HTSUS.

Note 1(f) to Chapter 70, which includes heading 7013, HTSUS, provides that the chapter does not cover "Christmas tree ornaments and other articles of chapter 95." Therefore, if the crystal blessing cup meets the standards for classification in chapter 95, the note will preclude classification under heading 7013 and necessitate classification under chapter 95.

In *Midwest of Cannon Falls, Inc. v. United States*, Slip Op. 96–19 (Ct. Int'l Trade, 1996), *aff'd in part, rev'd in part*, 122 F.3d 1423, Appeal Nos. 96–1271, 96–1279 (Fed. Cir. 1997) (hereinafter *Midwest*), the Court addressed the scope of heading 9505, HTSUS, specifically the class or kind of merchandise termed "festive articles," and provided new guidelines for classification of such goods in the heading. In general, merchandise is classifiable as a festive article in heading 9505, HTSUS, when the article, *as a whole*:

1. Is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal;
2. Functions primarily as a decoration or functional item used in celebration of, and for entertainment on, a holiday; and
3. Is associated with or used on a particular holiday.

Based upon a review of the articles subject to the *Midwest* decision, Customs is of the opinion that the Court has included within the scope of the class "festive articles," decorative household articles which are representations of an accepted symbol for a recognized holiday, and utilitarian/functional articles that are three-dimensional representations of an accepted symbol for a recognized holiday. See CUSTOMS BULLETIN, Volume 32, Numbers 2/3, dated January 21, 1998.

In addition to the criteria listed above, the Court considered the general criteria for classification set forth in *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*). Therefore, with respect to decorative and utilitarian articles related to holidays and symbols not specifically recognized in *Midwest* or in the CUSTOMS BULLETIN dated January 21, 1998, Customs will also consider the general criteria set forth in *Carborundum* to determine whether a particular good belongs to the class or kind known as "festive articles." Those criteria include the general physical characteristics of the article, the expectation of the ultimate purchaser, the channels of trade, the environment of sale (accompanying accessories, manner of advertisement and display), the use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use.

At issue here is whether the crystal blessing cup corresponds to articles used in celebration of a particular holiday. In other words, is the cut and etched piece of stemware which is commonly associated with drinking wine, so embellished here with a Hebrew lettering and symbols, that it has become part of the class of festive articles.

In considering the *Midwest* standards, the crystal blessing cup is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal. The blessing cup does appear to be a functional item used in the celebration of a festive occasion.

With respect to the general criteria set forth in *Carborundum* and further considered by the Court, we note that in terms of general physical characteristics, the cup is completely dedicated to use in connection with religious observance. The deep cutting of the Star of David on the side of the "cup" would limit the article's usefulness to ritual observance and

render it inappropriate for any other type of use, such as ordinary drinking of wine in connection with a meal. Moreover, the etching of Hebrew words around the bowl marks and distinguishes the article, tying it to a particular prayer recited in Hebrew.

The ultimate purchaser would have the expectation of using the article in connection with the celebration of the stated festive occasions and at no other time. While the article is decorative, in that it has a gold rim and it is made of a heavy lead-content glass, this article would appear to fall in the class of festive articles regardless of its decorative nature, in the same way that a "plain" nativity scene or Christmas stocking would also fall into that class.

Evidence of the channels of trade has not been presented, and it is unclear whether there would be stores that specialize in such merchandise. It would seem probable that the article would be offered year around in gift shops selling expensive items of high quality, as opposed to being offered for sale at a particular time of year or in religious supply stores. The latter point emphasizes that the use is intended to be in the home in a communal or family setting, not in houses of worship.

The environment of the sale is unclear. The use of the article in the same manner as merchandise which defines the class is satisfied in that the article will be used only on festive occasions, including the Sabbath, in a completely prescribed manner in connection with particular prayers, blessings and the like. In contrast to "ordinary" drinking glasses, including "ordinary" cut lead crystal and/or gilded stemware, the article will be sold only in units of one, not as a set or in multiples, and will be used until it breaks or is given away, only to be replaced by another blessing cup to be used for the same purpose.

The New York ruling under consideration here made a distinction between the Passover holiday during which the Seder plate would be used and "any number of Jewish festive occasions" providing an opportunity to use the crystal blessing cup. We differ with that opinion in our further consideration and understanding of the use of the crystal blessing cup. We are informed that the Sabbath observance is indeed festive and would be the most frequent use of the crystal blessing cup at the Kiddish and Havdalah marking the beginning and end of the observance. This use would satisfy the requirement that the article be used on a particular holiday that can be identified with certainty.

Holding:

The crystal blessing cup is classified in subheading 9505.90.60, HTSUS, the provision for "Festive, carnival, or other entertainment articles, * * * parts and accessories therefor: Other: Other."

NY C88308 is hereby modified.

In accordance with 19 U.S.C.1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO "PROTEIN A HYPER D" CHROMATOGRAPHY MEDIUM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of "Protein A HyperD" chromatography medium.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of "Protein A HyperD" chromatography medium, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on September 8, 1999, in the CUSTOMS BULLETIN, Vol. 33, No. 35/36.

EFFECTIVE DATE: This modification is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 3, 2000.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36, proposing to revoke New York Ruling Letter (NY) 890709, dated November 29, 1993, which classified "Protein A HyperD" chromatography medium in subheading 3822.00.1090, HTSUS, the provision for "[d]iagnostic or laboratory reagents * * * [c]ontaining antigens or antisera." No comments were received in response to this notice.

As stated in the proposal, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling not identified in this notice may raise the rebuttable presumption of a lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In NY 890709, Customs held that "Protein A HyperD" chromatography medium was classified in subheading 3822.00.1090, HTSUS, as indicated. Upon further review, we are of the opinion that "Protein A HyperD" chromatography medium does not fall within subheading 3822.00.1090, HTSUS. Rather it is classifiable in subheading 3822.00.5090, HTSUS, which provides for diagnostic or laboratory reagents other than those containing antigens or antisera. The analysis underlying this conclusion is set forth in HQ 962429, the attachment to this document.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 13, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, October 13, 1999.

CLA–2 RR:CR:GC 962429
Category: Classification
Tariff No. 3822.00.5090

MR. ARNAUD SCHMUTZ
BIOSEPRA INC.
111 Locke Drive
Marlborough, MA 01752

Re: "ProteinA Ceramic HyperD F," "ProteinA Ceramic HyperD 20μm" and "Protein A Hyper D" Chromatography Media; NY 890709.

DEAR MR. SCHMUTZ:

This is in response to your letter of August 19, 1998, to the Customs National Commodity Specialist Division in New York, requesting a binding ruling, under the Harmonized Tariff Schedule of the United States (HTSUS), for "ProteinA Ceramic HyperD F" and "ProteinA Ceramic HyperD 20μm" chromatography media. Your letter was referred to this office for reply. We regret the delay.

New York Ruling Letter (NY) 890709, issued to Sepracor Inc., your predecessor in interest, on November 29, 1993, classified a similar product, "Protein A HyperD" chromatography medium, in subheading 3822.00.1090, HTSUS, which provides for "[d]iagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006: [c]ontaining antigens or antisera: [o]ther."

Upon further consideration of this matter, we have concluded that the correct classification of Protein A based chromatography media is under subheading 3822.00.5090, HTSUS, which provides for "[d]iagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006: [o]ther: [o]ther."

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY 890709 was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36. No comments were received in response to that notice.

Facts:

"Protein A HyperD" chromatography medium consists of polystyrene beads bound to a number of Protein A ligands. "ProteinA Ceramic HyperD F" and "ProteinA Ceramic HyperD 20μm" differ from "Protein A HyperD" in that the bead substrate is a composite material of mineral ceramic and copolymer rather than polystyrene. Protein A ligands bind selectively to immunoglobulin G such that protein A based chromatography media are useful in column separation processes.

Immunoglobulin G is an antibody which is produced as part of the body's immune response to the presence of certain foreign bodies called antigens (antibody generators). Immunoglobulin G binds to the antibody thereby identifying it as a target for immunological attack. Immunoglobulin G is also capable of binding to protein A. However, it does not bind to protein A in the same manner as it would bind to an antigen. It is the crystallizable fragment (Fc) portion of immunoglobulin G which binds to protein A, while the antigen-binding fragments (Fab) of immunoglobulin G bind with compatible antigens. Protein A does not stimulate the immune response.

Issue:

Is protein A an antigen such that protein A based chromatography media are diagnostic or laboratory reagents containing antigens of subheading 3822.00.10, HTSUS?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the

Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 890709 "Protein A HyperD" chromatography medium was classified in subheading 3822.00.10, HTSUS, as a diagnostic or laboratory reagent containing antigens. An antigen is "any substance which is capable, under appropriate conditions, of inducing a specific immune response and of reacting with the products of that response." *Dorland's Medical Dictionary*, 27th ed., 1988. Protein A is somewhat similar to an antigen in that it binds to an antibody, immunoglobulin G, however it does not induce an immune response and does not bind to the antigen-binding fragments of immunoglobulin G. Thus, protein A is not an antigen.

Holding:

Protein A based chromatography media, including "ProteinA Ceramic HyperD F" "ProteinA Ceramic HyperD 20μm" and "Protein A Hyper D" chromatography media are classified in subheading 3822.00.5090, HTSUS, as diagnostic or laboratory reagents not containing antigens or antisera.

NY 890709 is revoked. In accordance with 19 U. S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE CHEMICAL COMPOUND THYMIDINE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters and treatment relating to the classification of the chemical compound thymidine.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of the chemical compound thymidine, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on September 8, 1999, in the CUSTOMS BULLETIN, Vol. 33, No. 35/36.

DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 3, 2000.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36, proposing to revoke Headquarters Ruling Letters (HQ) 955127 and 955128, both dated December 16, 1994, which classified the chemical compound thymidine in subheading 2938.90.00, HTSUS, the provision for "[g]lycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives: [o]ther." No comments were received in response to this notice.

As stated in the proposal, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling

not identified in this notice may raise the rebuttable presumption of a lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In HQ 955127 and HQ 955128 Customs ruled that the chemical compound thymidine was classified in subheading 2938.90.00, HTSUS, the residual provision for glycosides. The chemical compound thymidine ($C_{10}H_{14}N_2O_5$; CAS No. 50–89–5) consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. It is a constituent of deoxyribonucleic acid (DNA). Upon further review, we are of the opinion that thymidine does not fall within subheading 2938.90.00, HTSUS. Rather, it is classifiable in subheading 2934.90.90, HTSUS, which provides for nucleic acids and other heterocyclic compounds. The analysis underlying this conclusion is set forth in HQ 963039 and HQ 963040 (Attachments A and B, respectively). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 14, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, October 14, 1999.
CLA–2 RR:CR:GC 963039 MGM
Category: Classification
Tariff No. 2934.90.9000

MS. ALICE M. WHITE
S.S.T. CORPORATION
P.O. Box 1649
Clifton, NJ 07015–1649

Re: Thymidine; Revocation of HQ 955127.

DEAR MS. WHITE:

This office has determined that Headquarters Ruling Letter (HQ) 955127, issued to you on December 16, 1994, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of thymidine, is in error. In HQ 955127 Customs ruled that thymidine was classified in subheading 2938.90.00, HTSUS, the provision for glycosides other than rutoside. Upon review of this ruling, Customs has discovered that thymidine should be classified in subheading 2934.90.90, HTSUS, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other. Therefore, this ruling revokes HQ 955127.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of HQ 955127 was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36. No comments were received in response to that notice.

Facts:

Thymidine ($C_{10}H_{14}N_2O_5$; CAS No. 50–89–5) consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. It is a constituent of deoxyribonucleic acid (DNA).

Presidential Proclamation 7207, dated July 1, 1999, added thymidine to Table 3 of the Pharmaceutical Appendix to the HTSUS. *See* 64 FR 36549. This may enable thymidine to qualify for duty-free entry pursuant to General Note 13, HTSUS.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUS, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUS, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUS, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUS, rather than heading 2938, HTSUS.

Within heading 2934, HTSUS, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUS, because it is not an aromatic or modified aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUS.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUS, in NY A84837, dated June 25 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUS.

HQ 955127 is revoked. In accordance with 19 U. S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 14, 1999.
CLA–2 RR:CR:GC 963040 MGM
Category: Classification
Tariff No. 2934.90.9000

MR. BENNIE HOLZAPFEL
GEORGE UHE CO., INC.
12 Rte. 7, N.
Paramus, NJ 07653

Re: Thymidine; Revocation of HQ 955128.

DEAR MR. HOLZAPFEL:

This office has determined that Headquarters Ruling Letter (HQ) 955128, issued to you on December 16, 1994, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of thymidine, is in error. In HQ 955128 Customs ruled that thymidine was classified in subheading 2938.90.00, HTSUS, the provision for glycosides other than rutoside. Upon review of this ruling, Customs has discovered that this product should be classified in subheading 2934.90.90, HTSUS, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other. Therefore, this ruling revokes HQ 955128.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY 890709 was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36. No comments were received in response to that notice.

Facts:

Thymidine ($C_{10}H_{14}N_2O_5$; CAS No. 50–89–5) consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. It is a constituent of deoxyribonucleic acid (DNA).

Presidential Proclamation 7207, dated July 1, 1999, added thymidine to Table 3 of the Pharmaceutical Appendix to the HTSUS. *See* 64 FR 36549. This may enable thymidine to qualify for duty-free entry pursuant to General Note 13, HTSUS.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUS, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUS, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUS, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a

purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUS, rather than heading 2938, HTSUS.

Within heading 2934, HTSUS, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUS, because it is not an aromatic or modified aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUS.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUS, in NY A84837, dated June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUS.

HQ 955128 is revoked. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY 890709 was published on September 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 35/36. No comments were received in response to that notice.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Decisions of the United States Court of International Trade

(Slip Op. 99–102)

BMW MANUFACTURING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–03–00396

(Dated September 30, 1999)

JUDGMENT

RESTANI, *Judge:* The parties have advised the court that plaintiff paid the international shipping charges for the merchandise that was the subject of Slip Op. 99–95. Therefore, this case presents no controversy as to whether the importer, as opposed to the shipper, is liable for Harbor Maintenance Tax payments on goods admitted to a foreign trade zone. If there is "importer" liability under 26 U.S.C. § 4461(c), plaintiff would be such an importer. If there is "shipper" liability, the parties have agreed that plaintiff fits the regulatory definition of shipper.

Accordingly, plaintiff was liable for the payments it made and judgment is entered for defendant.

(Slip Op. 99–103)

TAIYUAN HEAVY MACHINERY IMPORT AND EXPORT CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND MAGNESIUM CORP. OF AMERICA, DEFENDANT-INTERVENOR

Court No. 98–02–00411

[Plaintiffs' Motion for Judgment Upon the Agency Record denied, case dismissed.]

(Decided October 6, 1999)

Riggle & Craven (David A. Riggle, David J. Craven), for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Lucius B. Lau); Christine E. Savage,* Attorney Advisor, Office of the Chief Counsel, Department of Commerce, of counsel, for Defendant.

Baker & Botts, L.L.P. (William D. Kramer, Clifford E. Stevens, Jr.), for Defendant-Intervenor.

OPINION

BARZILAY, *Judge:* Plaintiff has moved for Judgment Upon an Agency Record, pursuant to USCIT R. 56.2 contesting certain parts of the Department of Commerce, International Trade Administration's ("Commerce") final results in a new shipper administrative review, *Pure Magnesium from the People's Republic of China: Final Results of the Antidumping Duty New Shipper Administrative Review,* 63 Fed. Reg. 3085 (Jan. 21, 1998) ("Final Results"). The Court has jurisdiction under 28 U.S.C. § 1581(c) (1994).

I. BACKGROUND

On May 12, 1995, following an investigation, Commerce published antidumping duty orders covering imports of pure magnesium from the People's Republic of China ("PRC"), the Russian Federation and Ukraine. *See Notice of Antidumping Duty Orders: Pure Magnesium from the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation,* 60 Fed. Reg. 25691 (May 12, 1995). Plaintiff, a Chinese manufacturer/exporter of the subject merchandise, requested Commerce to initiate a new shipper review so that Plaintiff would receive an individually assigned dumping margin instead of the PRC-wide rate of 108.26%. The period of review ("POR") was May 1, 1996—October 31, 1996. *See* Final Results at 3085. On October 23, 1997, Commerce published its preliminary results finding that Plaintiff was selling the subject merchandise at less than fair value and assigned Plaintiff an 83.92% margin. *See Pure Magnesium from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Administrative Review,* 62 Fed. Reg. 55215, 55218 (Oct. 23, 1997) ("Preliminary Results"). On January 21, 1998, Commerce published its Final Results, lowering the margin to 69.53%. *See* Final Results at 3092. Plaintiff timely filed its

summons and complaint pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994) challenging certain aspects of Commerce's Final Results.

II. Standard of Review

In reviewing a challenge to Commerce's determination in an antidumping administrative review, the court is to hold unlawful a determination, finding or conclusion by Commerce that is unsupported by substantial evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm.*, 383 U.S. 607, 620 (1966). The court is prohibited from overturning a decision with which it does not agree provided Commerce's decision is supported by substantial evidence and is otherwise in accordance with law. *See Kerr-McGee Chemical Corp. v. United States*, 21 CIT ____, ____, 985 F. Supp. 1166, 1173–74 (1997) (citing *Consolo*, 383 U.S. at 620), *aff'd* 185 F.3d 884 (Fed. Cir. 1999).

III. Discussion

Plaintiff argues that Commerce failed to follow its regulations in several respects and that this failure was prejudicial. Plaintiff asserts Commerce erred by not addressing four of the sixteen points contained in Plaintiff's case brief. The four issues Plaintiff claims were not addressed were: 1) the calculation of a normal value ("NV") that exceeded the world market price by 150–225%; 2) the acceptance of information without an attached factual certification; 3) the acceptance of material requesting confidential treatment that did not state reasons for proprietary treatment; and 4) the acceptance of untimely submissions.

A. *Plaintiff's Argument Concerning World Market Prices Did Not Raise a Material Issue That Commerce Needed to Address in the Final Results.*

Commerce is required to publish notice of its determinations in the Federal Register containing "the facts and conclusions of law upon which the determination is based * * *." 19 U.S.C. § 1673d(d). The Statement of Administrative Action accompanying the Trade Agreements Act of 1979 explained the publication requirement as limited to material issues of fact or law. *See Trade Agreements Act of 1979, Statements of Administrative Action*, H. Doc. No. 96–153 425 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 693 (1979) ("[A] statement of findings of fact and conclusions of law on all material issues shall be made available to the Commission, the interested parties and public."). The common understanding of material as it is used in this context is "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with the matter, as distinguished from form."

BLACK'S LAW DICTIONARY 976 (6th ed. 1990). Commerce did not have to address Plaintiff's argument about the relationship of world market prices to the constructed NV because the issue was not material in that it would not have affected the final determination in this case.

Even if Commerce were to use the world market price as a check on the NV calculation, the underlying methodology and results would be the same. In a case involving a non-market economy country[1] ("NME"), Congress has directed Commerce to determine NV "on the basis of the value of the factors of production utilized in producing the merchandise. * * *" 19 U.S.C. § 1677b(c)(1). The statute continues by directing Commerce to use the best available information in valuing the factors. *See id.* Finally, the statute sets forth a non-exclusive list of factors and the means by which Commerce is to value them. *See id.* at §§ 1677b(c)(3)–(4). Nowhere does the statute direct Commerce to compare NV calculated from the factors of production to the world market price. In fact the nature of the statutory scheme precludes using world market price as a substitute for the constructed NV.

What Plaintiff's argument amounts to is that somehow Commerce failed to use the best available information to arrive at its calculated NV because NV was out of line with world market price. Plaintiff does not contend that Commerce should have substituted the world market price for the calculated NV, only that world market price was a benchmark for accuracy.[2] Therefore, Commerce was required to explain whether it used the best available information in valuing each factor of production, which, as discussed *infra*, it did. To do otherwise would contravene the statutory directive to "determine the normal value of the subject merchandise on the basis of the value of the factors of production * * *." 19 U.S.C. § 1677b(c)(1). Thus, the issue of world market prices as they relate to constructed NV was not material and did not need to be addressed in the Final Results since the statute directs Commerce specifically to consider whether the values for each factor of production were based on the best available information.

B. *Procedural Irregularities Did Not Substantially Prejudice Plaintiff.*

The rules in question were not intended to confer important procedural benefits, so for Plaintiff to prevail on its procedural claims it must demonstrate that it was substantially prejudiced by Commerce's actions. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) ("'[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." (quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953)); *see also Oy v. United States*, 61 F.3d

[1] Plaintiff did not dispute the PRC's designation as such.

[2] The Court does not reach the issue of whether comparing world market price to NV in an NME case is permissible. The Court notes that the Federal Circuit has affirmed the use of world market price to value a factor of production, *see Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 n.5 (Fed. Cir. 1999), but it has never held it to be a benchmark for NV in an NME case.

866, 875 (Fed. Cir. 1995) (quoting *American Farm Lines*); *Ferro Union, Inc. v. United States*, 44 F. Supp.2d. 1310, 1316–17 (CIT 1999) (same).

Plaintiff's procedural grievances can be discussed together since they all involve similar alleged underlying errors. Plaintiff contends that Commerce did not follow its regulations governing submission of information. If Commerce had rejected all of the nonconforming material, its decision would have not have been based on substantial evidence on the record. The regulations at issue govern submission of certifications of factual accuracy,[3] business proprietary information[4] and written argument.[5]

Plaintiff argues that Commerce's failure to address its procedural grievances on the record deprives the court and Plaintiff of understanding the agency's rationale. The Court does not agree with the Plaintiff that Commerce had to explain its reasons in the Final Results. An agency is free to relax its procedural requirements where substantive rights are not affected and absent a showing of substantial prejudice that decision is not reviewable. *See American Farm Lines*, 397 U.S. at 538–539. Therefore, while it was unnecessary for Commerce to address Plaintiff's procedural complaints in the Final Results the Court will treat the issue as whether Commerce's actions substantially prejudiced Plaintiff.

Defendant-Intervenor failed to include the requisite certification with a number of submissions of factual information. On October 27, 1997, pursuant to Commerce's instructions, Defendant-Intervenor submitted a certification covering all of the submissions which lacked it. *See* Pub. Doc. No. 76, fiche 17 ("A.R."), at frame 93. Plaintiff recognized the Defendant-Intervenor's belated submission of the certification of factual accuracy in its case brief to Commerce. *See* A.R. 21 at frame 21. However, Plaintiff did not argue that it suffered any harm due to the late submission. *See* A.R. 21 at frames 21–22. Furthermore, Commerce's regulations provide that "[a]t any time during the proceeding, the Secretary may request written argument on any issue from any interested party." 19 C.F.R. § 353.38(a). Since Plaintiff did not make a showing of harm to Commerce and since Commerce was free to request argument on any issue at any time, Plaintiff has not demonstrated substantial prejudice.

Next in the litany of procedural grievances comes Commerce's failure to reject factual submissions where Defendant-Intervenor requested

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[3] 19 C.F.R. § 353.31(i) (1997) provides that "[a]ny interested party which submits factual information to the Secretary must submit with the factual information the certification [stating the information is accurate and if submitted by counsel that there is no reason to believe it contains any material misrepresentations or omissions of fact]."

[4] 19 C.F.R. § 353.32(a)(3) (1997) provides that a person who submits factual information with a request for proprietary treatment "shall provide a full explanation why each piece of factual information subject to the request is entitled to proprietary treatment * * *."

[5] 19 C.F.R. § 353.31(a)(3) provides that "[t]he Secretary will not consider in * * * the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reason for the return of the information."

proprietary treatment without providing a reason.[6] As both Commerce and Defendant-Intervenor point out, the only party that requested confidential treatment of its information was the Plaintiff. Any information that Defendant-Intervenor submitted which contained Plaintiff's confidential data had to be submitted pursuant to a request for confidential treatment. While it would not create much of a burden for Defendant-Intervenor to have provided this as a reason, it certainly does not constitute substantial harm such that remand is required, or that the information should be removed from the administrative record. Commerce's regulations give the Secretary discretion to return noncompliant factual submissions but with the understanding that a compliant resubmission may be made. *See* 19 C.F.R. § 353.32(d). Commerce's failure to return the information did not substantially prejudice Plaintiff since Defendant-Intervenor would have had the opportunity to correct its mistake, and moreover, the information for which proprietary treatment was requested was Plaintiff's.

Finally, Plaintiff argues that Commerce accepted untimely submissions in this case from the Defendant-Intervenor, petitioner below, while it regularly holds respondents to strict deadlines. However, the Plaintiff does not claim that in this case it was held to a different standard, nor can it since Commerce accepted an untimely submission from it. *See* A.R. 12 at frame 22. A showing that in other cases Commerce has held respondents to regulatory time limits is insufficient to demonstrate that substantial prejudice occurred in this case.

More importantly, Plaintiff claims that Defendant-Intervenor's untimely submission of its rebuttal brief denied Plaintiff the opportunity to participate meaningfully in the public hearing because it was unsure of what constituted confidential information. Plaintiff's contention in this regard could demonstrate substantial prejudice, but after review of the transcript of the hearing, the Court is satisfied no such prejudice resulted. *See* A.R. 24 at frame 1. Plaintiff did not raise the issue to Commerce's hearing examiner until the end of its direct presentation and it did not mention any specific issues on which it could not comment. *See* A.R. 24 at frames 37–38. Plaintiff also responded to all of the questions posed to it without mentioning its inability to comment due to the untimely filing of Defendant-Intervenor's public rebuttal brief. *See* A.R. 24 at frames 29–30, 67–68, 70–73. Moreover, Plaintiff cites no specific piece of evidence to the Court that it was unable to discuss, but rather argues it was subject to a period of confusion shortly before the hearing. Plaintiff has not demonstrated that it was denied an opportunity to participate meaningfully in the hearing, nor has it otherwise shown that untimely submissions were accepted by Commerce from Defendant-Intervenor but rejected by Commerce from it. Accordingly, Plaintiff was not substantially prejudiced by any of the late filings.

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[6] While Defendant argues that Plaintiff failed to exhaust its administrative remedies by not pointing to specific faulty submissions, the Court assumes *arguendo* that Plaintiff has exhausted its administrative remedies on this point.

C. *Commerce's Decision to Use Certain Surrogate Values as the Best Available Information Was Supported By Substantial Evidence.*

The Federal Circuit has noted the troubles that surround constructing NV on the basis of the factors of production, pursuant to 19 U.S.C. § 1677b(c). *See e.g., Sigma Corp. v. United* States, 117 F.3d 1401, 1408 (Fed. Cir. 1997) ("[T]he process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise. * * *"); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Sigma Corp.*). While the statute provides guidelines, Commerce is accorded "wide discretion in the valuation of factors of production in the application of those guidelines." *Nation Ford Chemical Co.*, 166 F.3d at 1377 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (internal citations omitted)). Whether the material Commerce uses constitutes the best available information will vary dependent on the circumstances. *See id.*

On repeated occasions, Commerce has expressed its practice with regard to surrogate price data. Commerce prefers "to use surrogate price data which is: (1) an average non-export value; (2) representative of a range of prices within the POR if submitted by an interested party, or most contemporaneous with the POR; (3) product-specific; and (4) tax-exclusive." *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 16758, 16759 (Apr. 6, 1998)[7] (citing *Final Results of Antidumping Duty Administrative Review; Sebacic Acid from the People's Republic of China*, 62 Fed. Reg. 10530, 10534 (March 7, 1997); *see also Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China*, 62 Fed. Reg. 9160, 9163 (Feb. 28, 1997) ("[W]e selected the surrogate values based on the quality and contemporaneity of the data."); *Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products from the People's Republic of China*, 62 Fed. Reg. 1708, 1711 (Jan. 13, 1997) (same); *Notice of Final Determinations of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 Fed. Reg. 19026, 19030 (Apr. 30, 1996) (same).

In accordance with 19 U.S.C. § 1677b(c)(4), Commerce chose India and Indonesia as the most comparable countries to the PRC in terms of overall economic development and because both were significant producers of comparable merchandise, which Commerce determined to be aluminum. *See* Preliminary Results at 55217. The factors of production which Commerce valued were: raw materials, packing materials, labor, diesel fuel, electricity, overhead, selling, general and administrative expenses ("SG&A"), and profit. *See id.* Plaintiff does not dispute Com-

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[7] The Court recognizes that the date of initiation in *Heavy Forged Hand Tools* was March 18, 1997, *see* 62 Fed. Reg. 12793, while the date of initiation in the present case was December 31, 1996. *See* 61 Fed. Reg. 69067. However the time periods are not sufficiently separate in time to dissuade the Court that Commerce's practice was different.

merce's designation of India and Indonesia as appropriate surrogates, but contests the use of certain information to value various factors.

1. Substantial Evidence Supports Commerce's Valuation of Overhead, SG&A and Profit.

Plaintiff contends that Commerce should not have used a 1996 financial report of Southern Magnesium and Chemicals Limited because the report did not comport with generally accepted accounting principals ("GAAP") in India, the data was inconclusive and significant aberrations during fiscal year 1996 made the data unreliable. The Final Results state that Commerce used the financial report over Plaintiff's objections because it was the most product-specific, more contemporaneous to the POR, audited by an Indian accounting firm, and there was no evidence that the data was not reasonably representative of the experience of other Indian producers. *See* Final Results at 3088. In reviewing Commerce's determination the court's role is to determine "whether the record adequately supports the decision * * * not whether some other inference could reasonably have been drawn." *Daewoo Electronics v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citations omitted).

Commerce's decision to use the 1996 financial report of Southern Magnesium and Chemicals is supported by substantial evidence and in accordance with law. An Indian auditor's report is attached to the report which states that "proper books of account as required by law have been kept by the Company so far as appears from our examination of such books." A.R. 19 at frame 48. Furthermore, the data was more contemporaneous with the POR and it was more product specific. The Reserve Bank of India Bulletin, which Plaintiff submitted, although dated November, 1996 reported information from 1990–1993. *See* A.R. 18 at frame 14. Moreover, the data was for the processing and manufacturing of metals, chemicals and products thereof. *See id.* Commerce instead used data from a producer of the subject merchandise in accordance with its administrative practice. *See Notice of Determination of Sales at Less Than Fair Value; Polyvinyl Alcohol from the People's Republic of China*, 61 Fed. Reg. 14,057, 14,061 (March 29, 1996) ("For valuing such factors as factory overhead, general and administrative expenses and profit, the Department seeks to base surrogate values on industry experience closest to the product under investigation."). Finally, Plaintiff raised the argument that Southern Magnesium's data was affected by significant aberrations during fiscal year 1996, thereby making the data unreliable. *See* Final Results at 3088. However, Commerce addressed this in the Final Results, finding that Plaintiff provided no support for its statement. *See id.* Thus, Plaintiff failed to point to record evidence on which Commerce could base a finding that Southern Magnesium's data was unreliable. Accordingly, Commerce's determination was supported by substantial evidence and in accordance with law.

2. Substantial Evidence Supports Commerce's Valuation of Ferrosilicon.

Plaintiff contests Commerce's decision to value ferrosilicon by averaging the prices contained in the *Metal Bulletin* and the *Iron and Steel Newsletter*. Plaintiff contends that the *Metal Bulletin* did not provide sufficient details or reliable information for the values and that the *Iron and Steel Newsletter* and a 1995–1996 financial report of an Indian producer should have been used. Furthermore, Plaintiff argues that Commerce should not have excluded values for nonmarket economies because they represented world market prices.

Commerce's decision to average values from the *Metal Bulletin* and the *Iron and Steel Newsletter* and to reject the financial report is supported by substantial evidence. Constructing NV in a NME case is "difficult and necessarily imprecise." *Sigma Corp.*, 117 F.3d at 1407. Commerce acted within the guidelines set by the statute in averaging the values contained in the *Metal Bulletin* and the *Iron and Steel Newsletter* and Plaintiff has failed to show that the decision fell outside the wide latitude afforded to Commerce. *See Nation Ford Chemical Co.*, 166 F.3d at 1377. Commerce chose to average the values from both publications reasoning that the time period in both publications was neither more nor less contemporaneous than the POR. *See* Final Results at 3089. Commerce did not rely on the financial report submitted by Plaintiff because it found the price aberrationally low compared to the statistics from *Monthly Statistics of the Foreign Trade of India* ("*Monthly Statistics*") and the *Metal Bulletin*. *See id.* Rather than using just the information contained in the *Metal Bulletin*, as Defendant-Intervenor desired, Commerce averaged both values, excluding those from NMEs.

Furthermore, Commerce's decision to exclude NMEs is in accordance with its practice and Congressional intent, and thus in accordance with law. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Romania: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 37194, 37195 (July 11, 1997); *see also* S. Rep. No. 93–1298, at 174 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7311 ("[T]he supply and demand forces [in state-controlled economies] do not operate to produce prices, either in the home market or in *third countries*, which can be relied upon for comparison purposes." (emphasis added)); *see also* H.R. Conf. Rep. 100–576, at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 (when performing a factors of production assessment, "Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices."). Regardless of whether the reported prices were on the "world market," Congress' statements above, made in the context of explaining why a different methodology applies in an NME case, applies equally to what constitutes the best available information.

3. Substantial Evidence Supports Commerce's Valuation of Dolomite.

Plaintiff argues that Commerce's decision to use data from a single company's financial report to value dolomite was not based on substan-

tial evidence because single company data is subject to manipulation. Plaintiff submitted the *1994 Index Numbers of Wholesale Price in India* ("*Index Numbers*"), which it claimed had more current data making it more contemporaneous to the POR. Commerce used the financial report because it found the data to be more representative and more contemporaneous to the POR. *See* Final Results at 3089. The *Index Numbers* contained the averaged and indexed values for three grades of dolomite, Banduan, Lumps (1″–3″), Birmitrapur, Metallurgical Grade and Birmitrapur, BF Grade (25mm–75mm). *See* A.R. 18 at frame 23. Commerce found that the financial report contained the value for metallurgical grade dolomite since it came from an Indian producer of ferroalloy, which is a metallurgical process. While it might be possible reasonably to draw another inference from the record on this point, the court is not to disturb Commerce's finding unless it is not based on adequate record support. *See Daewoo Electronics*, 6 F. 3d at 1517–18. Since metallurgical grade dolomite is used in the production of magnesium, the value contained in the financial report was more specific than the averaged prices contained in the *Index Numbers*. Further, Commerce chose to use the financial report over the *Index Numbers* because there was no indication of why the prices from 1994 were selected for indexation. *See* Final Results at 3088–89. Thus, the Court finds that Commerce's valuation of dolomite was based on substantial evidence and was in accordance with law.[8]

4. Substantial Evidence Supports Commerce's Valuation of Coal.

Plaintiff argues that Commerce should have used the value for coal contained in the *Index Numbers*. Before Commerce, however, Plaintiff admitted that India had price controls on coal. *See* A.R. 10 at frame 75. Accordingly, the values contained in the *Index Numbers* would reflect such price controls. Commerce used the April 1995—March 1996 price from *Monthly Statistics* because Plaintiff provided no reason for finding the values unreliable. *See* Final Results at 3090. Furthermore, Commerce did not use the *Index Numbers* because there was no explanation of how the product-specific indices were determined or why 1994 prices were selected. *See* Final Results at 3090. Commerce also found the price reported in the *Monthly Statistics* more contemporaneous with the POR. Although Plaintiff maintains that Commerce has a preference for using actual surrogate data, as opposed to import data, it provides no authority for the statement. In fact, Commerce has used import statistics when the domestic prices appeared to be governed by price controls. *See Notice of Final Determination of Sales at Less Than Fair Value: Brake Drums and Rotors from the People's Republic of China*, 62 Fed. Reg. 9,160, 9,169 (Feb. 29, 1997). Additionally, the Federal Circuit has affirmed Commerce's use of import prices even when domestic prices were

[8] Plaintiff also asserts Commerce failed to subtract transportation costs from the reported price for dolomite. Plaintiff failed to cite any evidence to support its position, nor did it demonstrate that the *Index Numbers* were ex-factory. Commerce's decision not to accept a position espoused through conclusory statements does not render its determination unsupported by substantial evidence or otherwise not in accordance with law.

used to value other factors of production. *See Nation Ford Chemical Co.*, 166 F.3d at 1378. Thus, the Court finds that Commerce's valuation of coal was based on substantial evidence and is in accordance with law.

5. Substantial Evidence Supports Commerce's Valuation of Barium Chloride.

Plaintiff claims that Commerce should have used Indonesian import values instead of data from *United Nations Import Statistics* for January–December 1996. The *United Nations Import Statistics* contain import data from the United States while U.S. export data does not show exports of barium chloride to India. As a result, Plaintiff maintains that the *United Nations* data is inherently suspect because it contains values for products distributed indirectly, which would necessarily be of greater cost; and therefore, Commerce should have used Indonesian Import Data. Commerce based its decision to use the *United Nations Import Statistics* on its finding that it was more contemporaneous and that the discrepancy between two different countries' import and export data could result from various factors which would not mean the data is erroneous. *See* Final Results at 3090. Commerce also prefers to use data from a single surrogate country whenever possible. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the Russian Federation*, 62 Fed. Reg. 61,787, 61,790 (Nov. 19, 1997) (citing *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 57 Fed. Reg. 21,058, 21,062 (May 18, 1992)). Since there was no indication that the Indonesian Import Data did not also reflect greater costs due to indirect shipments, Commerce's decision to use the *United Nations Import Statistics* was based on substantial evidence and was in accordance with law.

6. Substantial Evidence Supports Commerce's Valuation of Electricity.

Plaintiff proposed that Commerce use a 1995 value for electricity from the *Confederation of India Industrial Handbook* because it provided electricity rates for rural areas in India and Plaintiff's plant is located in a rural area in China. Commerce instead used an August 1996 price for electricity in India reported in *Business World* because it was more contemporaneous with the POR. Furthermore, Commerce based its decision on the fact that the *Confederation of India Industrial Handbook* listed a rural rate for only one Indian state, which led Commerce to the conclusion that urban and rural rates in India are not different as a whole. *See* Final Results at 3091. Plaintiff, again, did not present Commerce with any evidence that the *Business World* report was unreliable, rather Plaintiff claimed the publication was one not normally considered by Commerce. Yet Commerce, in its letter to the parties inviting submissions on the factor valuation, stated it would use publicly available published information from surrogate countries. *See* A.R. 18 at frames 4–7. The *Business World* report was of the type Commerce notified the parties it would consider and Commerce was simply faced with choosing one source over another. Plaintiff did not provide any record

support, beyond its own unsupported statements, that the *Business World* report contained inaccurate information. Accordingly, Commerce's decision to use the rate for electricity listed in *Business World* was based on substantial evidence and in accordance with law.

7. Commerce Deducted Sales and Excise Taxes Where Appropriate.

Plaintiff contends that Commerce failed to deduct taxes from surrogate values assigned to raw materials. Commerce addressed this issue in the Final Results and deducted an amount for excise and sales tax from the value for sulfuric acid. *See* Final Results at 3091. However, Commerce did not deduct sales and excise taxes from any of the other raw material values because its practice is only to remove such values when there is an affirmative indication of their presence. *See id.* Plaintiff did not point to any specific evidence indicating that the values contained excise and sales tax, instead it relied on general information concerning Indian tax practices. Since Plaintiff did not present information about a specific surrogate value containing excise and sales tax, Commerce's decision to deduct excise and sales tax from the surrogate value for sulfuric acid and no others is based on substantial evidence and is in accordance with law.

D. *The Court Will Not Consider the Effect of the International Trade Commission's Remand Determination.*

Plaintiff urges the court to recognize the International Trade Commission's ("ITC") determination in *Magnesium from Ukraine*, USITC Pub. 3113, Inv. No. 731–TA–696–698 (Views on Remand) (June 1998).[9] Plaintiff claims that the court has jurisdiction under 28 U.S.C. § 1581(i). However, Plaintiff did not include this cause of action in its complaint, nor did it seek leave to amend its complaint. Because the underlying claim presents a number of complex jurisdictional and substantive issues, it would be an abuse of discretion for the court to amend the complaint *sua sponte* or to read it in such a way that would effectively amend it. Furthermore, the statute of limitations for claims under 28 U.S.C. § 1581(i) is two years, *see* 28 U.S.C. § 2636(i), therefore Plaintiff has the ability to file a separate action if it desires to pursue the matter.

USCIT R. 15(a) provides that after the time for amending of right has passed "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Even in instances where leave to amend is sought, the court must examine whether the amendment would cause undue delay or prejudice to the other party. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *accord Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990), *rev'd on other grounds*, 972 F.2d 1355 (Fed. Cir. 1992), *Saarstahl*

[9] In its remand determination, the ITC found that "an industry in the United States was not materially injured or threatened with material injury by reason of imports of pure magnesium from Ukraine * * *." *Magnesium from Ukraine*, USITC Pub. 3113, Inv. No. 731–TA–696–698 (Views on Remand) (June 1998). As a result, Commerce has revoked the outstanding antidumping duty order, but only with respect to Ukraine. *See* 64 Fed. Reg.46182 (Aug. 24, 1999). The ITC's original injury determination and its remand decision were based on cumulated imports from three countries (Russia, Ukraine and China). Therefore, Plaintiff claims there is no valid antidumping duty order as to any country in light of the ITC's remand decision. As discussed, the Court declines to address this matter.

AG v. United States, 20 CIT 1413, 1417, 949 F. Supp. 863, 866 (1996), *aff'd in part, rev'd on other grounds*, 177 F.3d 1314 (Fed. Cir. 1999). A party's inability to present facts or evidence because of an untimely amendment are considered prejudicial, *see Saarstahl*, 20 CIT at 1417, 949 F. Supp. at 865, while in assessing whether delay is undue the court may consider whether a litigant failed to assert the claim as soon as it was possible to do so. *See Saarstahl*, 20 CIT at 1417–18, 949 F. Supp. at 867.

In this case, Plaintiff altogether has failed to seek leave to amend its complaint. Plaintiff first included its request for relief on December 22, 1998, when it filed its Motion for Judgment Upon an Agency Record. The underlying vote that gave rise to Plaintiff's request was made on June 24, 1998. *See* 63 Fed. Reg. 33093, 33094 (June 17, 1998). Even if the court's decision affirming the ITC on October 20, 1998, is the relevant date for seeking leave to amend the complaint, almost two months passed without Plaintiff acting. Plaintiff's failure to seek leave to amend the complaint deprived the Defendant of the opportunity to oppose the motion and to contest the jurisdictional issues raised through any number of procedural devices. It would be even more prejudicial for the Court to read the complaint in a manner that would effectively amend it without providing the Defendant any briefing.[10] In light of the foregoing concerns, it would be an abuse of discretion for the court either to amend the complaint *sua sponte* or to consider the issue in any other manner.

IV. Conclusion

For the foregoing reasons, the Court denies Plaintiff's Motion for Judgment Upon an Agency Record. Judgment will be entered accordingly.

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[10] Nor is this a case where the underlying claim for relief could have been gleaned from the complaint. It is axiomatic that the Federal Rules require only notice pleading. However, Plaintiff requests the court to order the antidumping duty order to be revoked, a request that the Defendant simply could not have expected from the complaint.

(Slip Op. 99–104)

FERRO UNION, INC. AND ASOMA CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Court No. 97–11–01973

[Commerce remand determination affirmed.]

(Dated October 6, 1999)

Mayer, Brown & Platt (Simeon M. Kriesberg, Carol J. Bilzi, and *Peter C. Choharis)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele D. Lynch), Brian Peck*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Schagrin Associates (Roger B. Schagrin and *Alexander H. Schaefer)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* On March 23, 1999, the court remanded the final results of the Department of Commerce, International Trade Administration ("Commerce" or "the Department") in *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 62 Fed. Reg. 53,808 (Dep't Commerce 1997) (final results of antidumping admin. rev.) [hereinafter "*Final Results*"]. *See Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310 (Ct. Int'l Trade 1999).[1]

The case principally concerned whether Commerce properly applied the standard of affiliated parties, pursuant to 19 U.S.C. § 1677(33) (1994), in concluding that Saha Thai was affiliated with several companies based on common control by various family groupings. The court affirmed Commerce's interpretation of the term "family" pursuant to 19 U.S.C. § 1677(33)(A), although it found that Commerce had provided insufficient guidance as to the full ramifications of its interpretation of the term, specifically, that more distantly related family members than those listed in the statute were to be included. The court also instructed Commerce to revisit other factual determinations.

Commerce issued its remand determination on July 6, 1999. *See Remand Determination: Ferro Union, Inc. and Asoma Corporation v. United States, Court No. 97–11–01973* [hereinafter "*Remand Results*" or "*RR*"].

STANDARD OF REVIEW

In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

BACKGROUND

In the *Final Results*, Commerce found that Saha Thai had significantly impeded the review by failing to disclose affiliations with two produc-

[1] Familiarity with the court's earlier opinion is presumed.

ers, Thai Tube and Thai Hong, as well as affiliations with three home market customers (Companies A, B, and C), and two members of the Siam Steel Group (Companies D and E).[2] 62 Fed. Reg. at 53,809. Commerce found that Saha Thai was affiliated with these companies based on common control by family groupings, pursuant to 19 U.S.C. § 1677(33)(F).

Commerce concluded that Thai Tube/Hong was affiliated with Saha Thai because Saha Thai's Deputy Managing Director, Somchai Lamatipanont, is the uncle of Thai Tube/Hong's directors and principal shareholders. *Final Results*, 62 Fed. Reg. at 53,813. The court found that Commerce's interpretation of "family" as stated in 19 U.S.C. § 1677(33)(A), was reasonable, although Saha Thai had insufficient notice that uncles and nephews were to be considered "family" for purposes of affiliation. The court therefore ordered that, on remand, Commerce was to ignore the possible affiliation with Thai Tube/Hong for purposes of determining whether total adverse facts available could be applied to Saha Thai. *Ferro Union*, 44 F. Supp.2d at 1332. The court directed Commerce to determine whether an application of adverse facts was warranted without considering these two companies. *Id.*

Commerce found that Saha Thai was affiliated with Companies A, B, and C, through common control by family groupings. *Final Results*, 62 Fed. Reg. at 53,810. Commerce also found that Saha Thai was affiliated with the members of the Siam Steel Group, including Company D, a home market customer, and Company E, a steel pipe producer. *Id.* at 53,816. It was unclear to the court how Commerce defined these families, so it directed Commerce to "inform itself of the nature of the relationships among these people in order to assure itself that it has properly determined that the persons involved are family members as contemplated by the statute." *Ferro Union*, 44 F. Supp.2d at 1326. Because Commerce considered Saha Thai's failure to disclose these companies as further justification for its application of total adverse facts, the court also directed Commerce to assure itself "that the affected companies should have been identified by Saha Thai." *Id.*

The court found that Commerce had not properly followed the statutory framework for applying total adverse facts available in its *Final Results*. *See Ferro Union*, 44 F. Supp.2d at 1328–1331. Pursuant to the statute, Commerce shall use "facts otherwise available" if:

> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner re-

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[2] The identities of these companies are stated in the court's confidential version of *Ferro Union*, and in Commerce's *Remand Results*.

> quested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title * * *

19 U.S.C. § 1677e(a). In order to make an *adverse* inference, Commerce must make the additional finding required by 19 U.S.C. § 1677e(b) that the party has "failed to cooperate by not acting to the best of its ability." The court found that, "Commerce is obliged to explain why it concluded that a party failed to comply to the best of its ability prior to applying adverse facts, and it did not do so here." *Ferro Union*, 44 F. Supp.2d at 1331. "[Commerce] will decide whether it adequately defined affiliates for the purpose of identification of Companies A, B, C, D, and E, whether lack of identification of these companies impeded the investigation, and whether adverse facts are warranted based on failure to act to the best of ability, given the development of the law and the facts of this case." *Id.* at 1332.

In the original *Final Results*, Commerce chose 29.89 percent as the applicable total adverse facts available dumping margin. In its remand determination, Commerce concluded that an application of total adverse facts available was not warranted. Commerce stated that the issue of whether to collapse Thai Tube and Thai Hong into Saha Thai affected all sections of the questionnaire, whereas once Thai Tube and Thai Hong are disregarded, Commerce no longer found the use of total adverse facts available warranted. *RR*, at 3–4. Commerce stated that it continues to believe that the use of total adverse facts available was warranted, but only if Thai Tube and Thai Hong are taken into account.[3] *Id.* at 4.

Home market resellers

Commerce found that the absence of information on Companies A, B, and C (collectively "home market resellers")[4] and the affiliation with the Siam Steel Group only affected the home market sales database. *RR*, at 5. The absence of this information affected Commerce's ability to determine "whether the home market sales database was complete or whether downstream sales made by these resellers were necessary." *RR*, at 3. Commerce considered whether it was appropriate to use the remainder of Saha Thai's questionnaire response, in accordance with 19

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[3] In an attempt to justify its original determination to apply total adverse facts based on Saha Thai's failure to identify Thai Tube and Thai Hong, Commerce states an improper interpretation of 19 U.S.C. § 1677e. Commerce stated that "to impede a review is to obstruct its progress. If a party has obstructed a proceeding, it cannot have cooperated to the best of its ability." *Remand Results*, at 4. Commerce's reading does not properly recognize the distinction between § 1677e(a)(2)(C), invoking facts available when a party significantly impedes an investigation, and § 1677e(b), which provides for the use of an adverse inference in selecting the specific available facts, when a party fails to cooperate by not acting to the best of its ability.

The court noted in *Ferro Union*, that a "respondent could impede a review without intending to do so, for example, because it did not understand the questions asked. The statute requires an additional finding under Section 1677e(b) that a respondent could have complied, and failed to do so." 44 F. Supp.2d at 1330 n.44. If Commerce meant by its finding of "significantly impeding" a failure to cooperate to the best of ability, it was required to say so.

[4] In Commerce's preliminary and final results, only Companies A and B were identified as home market customers and resellers. Saha Thai placed information on the record prior to the issuance of the *Final Results* identifying Company C as a home market reseller as well. Commerce incorporated this information into its remand analysis and referred to all three companies as home market customers and resellers. *RR*, at 7 n.3.

U.S.C. § 1677m(e) (1994),[5] and found that the bulk of Saha Thai's information was usable. *RR*, at 5.

Commerce stated that its initial determination that Saha Thai had "significantly impeded" the review, pursuant to 19 U.S.C. § 1677e(a)(2)(C) was "largely based" on the finding that Saha Thai did not disclose information regarding Thai Tube and Thai Hong. Excluding Thai Tube and Thai Hong from the analysis, Commerce stated that it "no longer [found] it necessary to conclude that Saha Thai * * * significantly impeded the review." *RR*, at 6. Commerce maintained the finding that Saha Thai was affiliated with Companies A, B, and C, and concluded that Saha Thai failed to provide complete information on these home market resellers in a timely fashion, pursuant to 19 U.S.C. § 1677e(a)(2)(B), thereby justifying the use of facts otherwise available. Commerce also found an adverse inference was warranted, pursuant to § 1677e(b), because Saha Thai failed to comply to the best of its ability in its responses regarding these home market resellers. *RR*, at 6.

Upon an examination of the record evidence, Commerce found that each family it identified as a control group consisted of persons explicitly listed in § 1677(33)(A),[6] and that therefore Saha Thai should have known from the statutory definition of family that these companies were potential affiliates.[7] *RR*, at 13. Commerce found that Saha Thai should have identified these companies because the initial questionnaire asked Saha Thai to list all affiliated companies, and included a glossary of terms which set forth the definition of affiliated persons under § 1677(33). Commerce emphasized that findings of affiliation based on family relationships pre-dated the URAA, and had been upheld by this court. *See Ferro Union*, 44 F. Supp.2d at 1327 (discussing affiliation finding based on family relationship in *Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617 (Ct. Int'l Trade 1997)). Moreover, Commerce concluded that Saha Thai had sufficient notice of the need to list the home market resellers as affiliates because "[e]ach of the family groups that had control over both Saha Thai and one of the home market

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[5] Section 1677m(e) provides in relevant part:

> [Commerce] * * * shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority * * *, if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority * * * with respect to the information, and
>
> (5) the information can be used without undue difficulties.

[6] The section defines members of a family as "including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants." 19 U.S.C. § 1677(33)(A).

[7] Specifically, the Sae Heng/Ratanasirivilai family, which controls Company A, consists of Kim Hua Sae Heng (Saha Thai's Financial Director), his wife and children. *RR*, at 9. The Lamatipanont family, which controls Company B, consists of Somchai Lamatipanont (Saha Thai's Deputy Managing Director), his wife and children. *Id.* at 10. The Ampapankit family, which controls Company C, consists of Limsiam Ampapankit (Saha Thai's Chairman of the Board of Directors), and his [ ]. *Id.* at 11. Commerce ignored the other Saha Thai shareholders with the surname Ampapankit because it could not identify their family relationship.

The names of these families have various spellings in the record and in Commerce's *Remand Results*. The court continues to use the spelling it used in *Ferro Union*.

resellers was composed of individuals expressly included within [19 U.S.C. § 1677(33)(A)]." *RR*, at 13.

Saha Thai had identified members of the Siam Steel Group as potential affiliates, based on common management. *Proprietary Questionnaire Responses* (July 16, 1996), 6–7, C.R. Doc. 2, Def.'s App., Ex. 4, at 8–9. Commerce found that "by its own response, Saha Thai acknowledged that it should report affiliates on the basis of common ownership and management control by a family group." *RR*, at 13. Commerce found that Saha Thai's failure to report the three resellers was deliberate.[8] *Id.* at 13–14.

The failure to report the companies was of significance because Commerce did not have time to request that Saha Thai provide information regarding downstream sales of Saha Thai merchandise by the home market resellers, and Commerce was thus unable to compile a complete home market sales database. *RR*, at 14. Commerce needed to know whether the sales to the affiliated resellers were at arm's-length in order to determine whether the sales should be included in the calculation of normal value ("NV"). *See* 19 U.S.C. § 1677b(a)(5) (1994) ("If the foreign like product is sold * * * through an affiliated party, the prices at which the foreign like product is sold * * * by such affiliated party may be used in determining normal value.")

Commerce compared the weight-averaged affiliated and unaffiliated net prices by customer and product, and found that two of the home market resellers failed the arm's-length test. *RR*, at 14. Commerce did not have information regarding the sales prices of these companies, and therefore found that it did not have a complete home market sales database from which to calculate NV. *Id.* at 14–15. Commerce then decided to "make an inference adverse to the interests of Saha Thai in applying facts available with respect to home market sales by these affiliated resellers." *Id.* at 15. For the companies which failed the arm's-length test, Commerce retained Saha Thai's sales to these customers in the home market sales database and "assigned to them the highest net price by product control number as adverse partial facts available." *Id.*

Siam Steel Group

In the *Final Results*, Commerce found that Saha Thai was also affiliated with Companies D and E, members of the Siam Steel Group. 62 Fed. Reg. at 53,816. Upon re-examination, Commerce continued to find that these companies are affiliated with Saha Thai and that Saha Thai did not adequately respond to Commerce's questions regarding affiliates. Commerce, however, did not find upon remand that Saha Thai's failure to identify Companies D and E was of significance, and decided that an application of partial adverse facts available was unnecessary. *RR*, at 19. Although Commerce stated that the NV calculation was affected by the absence of Companies D and E, it was only affected to a small extent. On

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[8] Commerce disagrees that knowing failure is required under 19 U.S.C. § 1677e(b). Whether some type of negligence will suffice was not at issue in this case.

remand, Commerce "made the necessary modifications to Saha Thai's reported data so that sales to Siam Steel Group companies which were also Saha Thai end-user customers [were] treated as sales to affiliated customers for purposes of conducting Commerce's standard arm's-length test."[9] *Id.* Because none of the Siam Steel Group companies are resellers of Saha Thai merchandise, Commerce concluded that downstream sales were not at issue. *Id.*

Applying partial adverse facts available to the home market sales database for the failure to identify the home market resellers, Commerce calculated a revised dumping margin of 9.52 percent. *RR*, at 41. Because a complete substitute margin was not selected, plaintiffs no longer raise the issue of corroboration of a margin based on secondary data under 19 U.S.C. § 1677e(c).

DISCUSSION

Plaintiffs, Ferro Union, Inc. and Asoma Corp. (collectively "Ferro"), find that Commerce's remand determination is "substantially closer than were the *Final Results* to a determination in accordance with the law and the record evidence." Pls.' Comments at 1. Ferro disagrees with Commerce's application of partial adverse facts, but states that it does not wish to expend further resources on another remand, and therefore urges the court to affirm the *Remand Results*. Ferro nevertheless makes three arguments regarding why Commerce's application of partial adverse facts was unlawful. Plaintiffs cannot have it both ways: urging the court to affirm, but nevertheless asking the court to find that Commerce's remand results contain errors. The court finds that by asking the court to affirm the *Remand Results*, Ferro has waived its right to raise further issues. The court will not, therefore, consider the alleged failures regarding the application of partial adverse facts which Ferro sets forth in its comments.[10]

Defendant-Intervenor, Wheatland Tube Company, argues that Commerce should have applied total adverse facts available to Saha Thai on remand, even without considering Saha Thai's failure to list Thai Tube and Thai Hong as affiliates. Wheatland states that Commerce's finding that Saha Thai failed to provide complete information on affiliations with Companies A, B, and C, and that the failure was deliberate, warrants an application of total adverse facts. Def.-Intervenor's Comments at 3–4. Other than this alleged error, however, Wheatland states that

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[9] Pursuant to this calculation, [ ] of the affiliated home market end-user customers failed the arm's-length test, [ ]. Sales to [ ] were excluded from Commerce's analysis for the remand determination. *RR*, at 19.

[10] Ferro argues that Commerce should not have applied partial adverse facts because Saha Thai is not affiliated with Companies A, B, and C on the grounds that Commerce failed to show how the families were in a position to control Saha Thai's decisions regarding pricing, production, or cost. *See* 19 C.F.R. § 351.102(b) (1999) ("[Commerce] will not find that control exists * * * unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.").

Ferro also states that Saha Thai could not have known from Commerce's questionnaires that it was to consider Companies A, B and C potential affiliates, and that therefore, the failure to report these companies was not "deliberate." *See Ferro Union*, 44 F. Supp.2d at 1331 ("In order to apply adverse facts available, Commerce must * * * conclude that Saha Thai knew that Companies A, B, C * * * could be considered affiliates and deliberately chose not to disclose them as such.").

Lastly, Ferro states that Commerce failed to check that Saha Thai's sales to Companies A and B were in the ordinary course of trade.

Commerce's remand results are supported by substantial evidence and are in accordance with law.

The only issue on which any party arguably seeks a second remand is whether Commerce's application of partial adverse facts, instead of total adverse facts available, was correct.[11] The court, therefore, need only address this question.

Wheatland contends that the court's instruction that Commerce ignore Saha Thai's failure to report a potential affiliation with Thai Tube and Thai Hong was in error,[12] but that even without considering Saha Thai's failure to report these two companies, an application of total adverse facts available is required in this case.

Wheatland emphasizes that Commerce found that Saha Thai failed to provide complete information concerning its affiliation with Companies A, B, and C, failed to report their downstream sales, and that therefore, information necessary for an accurate margin calculation was not on the record. Def.-Intervenor's Comments at 3. Commerce also found the failure to report these affiliations was deliberate, and merited an application of adverse inferences. *See RR*, at 13–14. Wheatland contends that the data was so deficient that it precluded "any remotely accurate calculation of normal value" and that Commerce's application of "adverse partial facts available fails to recognize the extent to which the home market sales database was compromised by the fact that no downstream sales information was ever collected." Def.-Intervenor's Comments at 4. Wheatland stresses that in its view, Saha Thai refused to cooperate, and that the application of total adverse facts available was warranted. Wheatland does not propose, however, that the 29.89 percent margin originally applied in the *Final Results* should be the total facts available margin. Rather, Wheatland proposes a margin of 17.28 percent, the highest calculated margin applied to Saha Thai in a previous less than fair value investigation. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 18,375, 18,376 (Dep't Commerce 1996) (amended final results).

Commerce agreed with Wheatland that Saha Thai failed to provide complete responses to the Department's requests for information on affiliates. *Remand Results*, at 27. The Department found, however, that "applying partial adverse facts available adequately addresses this deficiency." *Id.* at 28. The majority of Saha Thai's reported sales in the home market database did not fail Commerce's arm's-length test and were

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[11] Although Wheatland asserts that a margin based on total adverse facts available should have been applied by Commerce, it is unclear whether Wheatland is seeking a second remand, or asking the court to impose an alternative margin. The court assumes remand is sought on this limited issue.

[12] Wheatland states that the court's reasoning in *Ferro Union* is flawed because it stated that the "plain meaning" of family includes uncles and nephews, but concluded that Saha Thai did not have notice that "family" encompassed this relationship. *See Ferro Union*, 44 F. Supp.2d at 1325–26. Wheatland ignores the context of the court's statement. The court did not find that the meaning of "family" was explicit in the statute, and found it necessary to determine, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), whether Commerce's construction of affiliates was permissible. *See Ferro Union*, 44 F. Supp.2d at 1324.

The court found that the agency's interpretation of family was a permissible construction of the statute, not that the statute was clear on its face. Therefore, it was not inconsistent for the court to conclude that Commerce's interpretation of "family" was reasonable, but that Commerce failed to place Saha Thai on notice that it would construe family to encompass more relationships than those listed in the statute.

"usable and unaffected by Saha Thai's reporting errors."[13] *Id.* The Department stated that its NV calculation was based on an "imperfectly reported database," but found that these deficiencies were addressed by the use of partial adverse facts available. *Id.*

The court finds Wheatland's arguments that there were "gross deficiencies" in the information submitted unconvincing. Commerce properly followed the court's remand instructions regarding whether the failure to identify Companies A, B, and C warranted an application of adverse facts available. Commerce defined the families at issue and found that these families controlled Saha Thai.[14] Commerce then determined the significance of this failure by Saha Thai, and found that it only affected the home market sales database. Because Commerce found that Saha Thai had an understanding of what types of relationships could constitute affiliation pursuant to 19 U.S.C. § 1677(33), based on Saha Thai's admission that the Siam Steel Group was a "potential affiliate," Commerce determined that Saha Thai failed to act to the best of ability, and that an adverse inference was appropriate in accordance with 19 U.S.C. § 1677e(b). Commerce found, however, that this deficiency was limited in scope, and therefore addressed the deficiency by applying adverse facts to a portion of the information and calculating a margin based on Saha Thai's own information. The Department resorted to partial adverse facts in order to correct a situation where the information was usable, albeit incomplete.

Commerce's decision to use information submitted by Saha Thai accords with Commerce's statutory responsibility pursuant to 19 U.S.C. § 1677m(e), to use a party's information even if it is incomplete. As Commerce clarified in the *Remand Results*, the "partial use of facts available in the calculation of normal value does not * * * compromise the U.S. sales data; it affects the results of the sales comparisons. This is a normal consequence of the use of partial adverse facts available." *Remand Results*, at 28. Moreover, the information Commerce used on remand was verified, and all parties agree that if the application of partial adverse facts was lawful, the information Commerce chose to use was proper. *See* Pls.' Comments at 9–10; Def.-Intervenor Resp. at 1.

Under the former statute any deliberate failure to cooperate could warrant full adverse treatment because a party may not pick and choose among the information it is requested to submit. *See Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 915, 865 F. Supp. 857, 865 (1994).[15] The court need not decide whether such treatment would be permissible under the new statute

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[13] Sales to the resellers which failed Commerce's arm's-length test made up only [ ] percent of the home market sales database. *Remand Results*, at 28.

[14] The court notes again that although Ferro tries to argue that these families did not, in fact, control Saha Thai, Ferro waived this argument by asking the court to affirm the remand results in their entirety.

[15] As explained in *Ad Hoc*, under the old BIA standard, generally Commerce resorted to "total BIA" for a "respondent whose reporting or verification failure is so extensive as to make its entire response unreliable." *Ad Hoc*, 18 CIT at 915 n.21. The choice of the particular total BIA rate then depended on the respondent's level of cooperation. Commerce would apply "partial BIA" when the respondent's information was deficient in limited respect, but Commerce did not consider a respondent's level of cooperation in the application of partial BIA. *Id.*

based on these facts. The court finds that Commerce's selection of partial adverse facts, instead of total adverse facts, was a reasonable choice. See *Toyota Motor Sales, U.S.A., Inc. v. United States*, 15 F. Supp.2d 872, 882 (Ct. Int'l Trade 1998) (upholding Commerce's determination to apply partial adverse facts available). The facts available statute is designed to reach a reliable margin, even in the face of an uncooperative respondent. *See* 19 U.S.C. § 1677e(c) (when relying on secondary information, Commerce "shall, to the extent practicable, corroborate that information from independent sources * * * reasonably at [its] disposal.").

Commerce's approach here furthers the purpose of achieving a reliable and accurate margin, because it recognizes that Saha Thai only failed to provide information in one respect (the information pertaining to the home market resellers). It also furthers the goal of accuracy because Commerce used Saha Thai's own information, which is more likely to be an accurate reflection of the company's sales than other information. By retaining the sales to Companies A and B in the home market sales database and assigning to them the highest net price by product control number, Commerce also preserved an adverse consequence for Saha Thai's failure to provide information on these home market resellers. The court therefore upholds Commerce's application of partial adverse facts as in accordance with law and supported by substantial evidence.

Accordingly, the court affirms the *Remand Results* addressed herein.

(Slip Op. 99–105)

SKF USA INC., SKF FRANCE S.A., SARMA, SKF GMBH, SKF INDUSTRIE S.P.A., AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 98–07–02540

Defendant-intervenor, The Torrington Company ("Torrington"), moves to dismiss this action for lack of jurisdiction on the ground that the summons is defective. The summons appeals certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 33,320 (June 18, 1998), *amended by, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany, Italy, and Sweden; Amended Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 38,369 (July 16, 1998). The review covers four countries from which plaintiffs, SKF USA INC., SKF FRANCE S.A., SARMA, SKF GmbH, SKF INDUSTRIE S.p.A. and SKF SVERIGE AB (collectively "SKF"), import and export antifriction bearings. Torrington contends that SKF should have filed a separate summons for each country contained in the review. Plaintiffs, as well as the defendant, the United States, oppose Torrington's motion to dismiss.

Held: Torrington's motion to dismiss for lack of jurisdiction is denied.

[Torrington's motion to dismiss is denied.]

(Dated October 7, 1999)

Steptoe & Johnson LLP (Herbert C. Shelley and *Alice A. Kipel)* for the plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director*)*, for the defendant.

Stewart and Stewart (Terence P. Stewart, Geert De Prest, Wesley K. Caine, and *Lane S. Hurewitz)* for the defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Defendant-intervenor, The Torrington Company ("Torrington"), moves to dismiss this action for lack of jurisdiction on the ground that the summons is defective. The summons appeals certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("final results"), 63 Fed. Reg. 33,320 (June 18, 1998), *amended by, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany, Italy, and Sweden; Amended Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 38,369 (July 16, 1998). The review covers four countries from which plaintiffs, SKF USA INC., SKF FRANCE S.A., SARMA, SKF GmbH, SKF INDUSTRIE S.p.A. and SKF SVERIGE AB (collectively "SKF"), import and export antifriction bearings. Torrington contends that SKF should have filed a separate summons for each country contained in the review. Plaintiffs, as well as the defendant, the United States, oppose Torrington's motion to dismiss.

BACKGROUND

In this case, the final results cover three classes of antifriction bearings ("AFBs"): ball bearings ("BBs"), cylindrical roller bearings ("CRBs") and spherical plain bearings ("SPBs"). The final results cover imports from eight countries. SKF exports and imports AFBs from four of these countries: France, Germany, Italy and Sweden.

On July 17, 1998, SKF filed a summons with this Court appealing the final results pursuant to 19 U.S.C. § 1516a(a)(2). In the summons, SKF specified that it was appealing the results concerning "antifriction bearing imports from France, Germany, Italy, and Sweden." SKF also cited the respective case numbers, A–427–801, A–428–801, A–475–801 and A–401–801.

DISCUSSION

I. *Contentions of the Parties*

Torrington's principal contention is that the United States has not waived its immunity from suit for actions commenced with a single summons to contest the final results of an antidumping administrative review made with respect to four countries with which SKF trades. Torrington contends that 19 U.S.C. § 1516a, the rules of the Court and

Form 3 in the Appendix of Forms to the rules of this Court all envision that a separate summons must be filed for each country contained in the review. Torrington argues that the decisions for each country that SKF appeals are separate determinations and SKF, therefore, should file a separate summons for each country. Torrington does not believe that the results of all four countries constitute a single determination.

Torrington appears to try to bolster its argument by stating that Commerce issues final results on a country-specific basis. Torrington claims that it is aware that appeals by exporters regarding final results reached in earlier reviews of the orders went without challenge even though based on a single summons, but argues that jurisdictional issues can be raised at any time. Torrington also contends that the issue is one of first impression before this Court and prior actions where plaintiffs combined appeals of several determinations in one summons were unchallenged.

SKF makes several arguments against Torrington's motion to dismiss. First, SKF argues that nothing in 19 U.S.C. § 1516a, the Court's rules or Form 3 precludes SKF from using a single summons to appeal an antidumping decision covering four countries from which SKF imports and exports AFBs. Second, SKF argues that all the elements of a proper summons have been satisfied. Specifically, SKF argues that the summons gave Torrington and the government timely notice of the nature of SKF's appeal because it identified the subject of the appeal by case number, country and SKF company name. Finally, SKF argues that even if Torrington's interpretation of 19 U.S.C. § 1516a is correct, the appeal is still proper because the review at issue constitutes a single determination.

The government also opposes Torrington's motion to dismiss. First, the government argues that no statutory language precludes a plaintiff from filing a summons appealing several determinations. Second, the government contends that the filing of one summons appealing four separate administrative determinations is an administrative, not a jurisdictional, matter. As support for its argument, the government cites 28 U.S.C. § 2633(b), which provides the Court with the power to prescribe rules for severances. Third, the government draws an analogy to actions brought under 28 U.S.C. § 1581(a), which gives the Court jurisdiction to hear the denial of a protest. The government argues that although § 1581 refers to "a" protest, the Court has entertained actions concerning the denial of several protests.

II. *Jurisdiction*

This Court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(c) (1994), which provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (1994), provides for judicial review in antidumping duty proceedings. Section 1516a(a)(2)(B)(iii) is of particular relevance to this case. It provides the Court with jurisdiction over "a fi-

nal determination" made "by the administering authority or the Commission." 19 U.S.C. § 1516a(a)(2)(B)(iii). The definition of the term "administering authority" includes "the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority * * * are transferred by law." 19 U.S.C. § 1677(1) (1994). Thus, this Court has jurisdiction over final determinations made by Commerce such as the final results of an administrative review.

Torrington does not allege that the Court lacks subject matter jurisdiction over the present action. As discussed above, the dispute falls squarely within the ambit of the Court's jurisdiction as defined by 28 U.S.C. § 1581(c). Rather, Torrington's concern is whether SKF properly invoked the jurisdiction of the Court in filing a single summons to appeal the final results of an antidumping administrative review that encompassed four separate determinations, each for a country from which SKF imports and exports AFBs. The question of whether the failure to file a separate summons for each country is jurisdictional depends upon whether: (1) the filing of separate summonses is a condition upon which the United States has consented to be sued under 19 U.S.C. § 1516a; or (2) the filing of separate summonses is a housekeeping or administrative matter within this Court's discretion to require. *See Pollack Import-Export Corp. v. United States*, 52 F.3d 303, 306–07 (Fed. Cir. 1995).

To properly invoke the jurisdiction of the Court in an action against the government, a litigant must comply with the terms on which the government had consented to be sued. "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citation omitted). The United States has consented to be sued in the Court of International Trade according to the terms and conditions specified in 19 U.S.C. § 1516a(a)(2)(A). *See Georgetown Steel Corp. v. United States*, 4 Fed. Cir. (T) 143, 147, 801 F.2d 1308, 1312 (1986). Thus, the Court has no jurisdiction over the suit if the litigant does not comply with the terms of § 1516a(a)(2)(A). *See id.* at 147, 801 F.2d at 1312.

Section 1516a(a)(2)(A) requires that a litigant who wishes to contest a determination such as the one in this case file a summons within thirty days of the publication of the notice in the Federal Register and also file, "within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court." Here, SKF properly complied with the statutory prerequisites of § 1516a(a)(2)(A) by filing a summons and complaint within the time limits imposed by that section.

There is another jurisdictional prerequisite to bringing an action pursuant to 19 U.S.C. § 1516a that is found in 28 U.S.C. § 2632(c) (1994). Section 2632(c) provides that a § 1516a action "shall be commenced by filing * * * a summons or a summons and a complaint, as prescribed in such section, with the content and in the form, manner, and style pre-

scribed by the rules of the court." Thus, § 2632(c) provides a jurisdictional requirement—that a summons or a summons and a complaint be used to commence an action. Section 2632(c) also gives the Court authority to create rules for the administration of its jurisdiction. Although the Court's power to enact rules of procedure may stem from a statutory grant of authority, compliance with these rules of procedure is not a prerequisite to the Court's jurisdiction. *See Sherwood*, 312 U.S. at 589–90; *Pollack*, 52 F.3d at 306–07; *American Chain Ass'n v. United States*, 13 CIT 1090, 1093, 746 F. Supp. 112, 114–15 (1989).

Neither the jurisdictional prerequisites of § 1516a(a)(2)(A) and § 2632(c) nor the Court's rules of procedure prohibit the filing of a single summons to contest the results of an administrative review encompassing the antidumping determinations of four countries from which SKF imports and exports AFBs. The issue of a single summons falls into the area of housekeeping or administrative matters.

The United States Court of Appeals for the Federal Circuit ("CAFC") has been instructive in resolving this issue. In *Pollack*, the importer brought suit to contest the denial of a protest and filed a summons showing only one entry, even though the protest covered four entries. 52 F.3d at 305. The CAFC held that the importer's "failure to list the entries on the summons was not jurisdictional." *Id.* at 304. The CAFC rejected the government's argument that because the summons form in the Appendix of Forms of the Court of International Trade Rules contained spaces for each individual entry involved in the protest, the Court lacked jurisdiction over the entries not listed. *See id.* at 306. The CAFC reasoned that the "intent of Congress expressed in the statutes governing judicial review of protest decisions" was not to oust this Court of jurisdiction of an entry simply because it was not listed on the summons. *Id.*

Pollack involved Court rules arising from 28 U.S.C. § 2632(b). *Pollack* stated that § 2632(b) imposed one jurisdictional requirement—that a suit under 19 U.S.C. § 1515 be instituted by filing a summons—and also provides that the action "be commenced * * * with the content and in the form, manner, and style prescribed by the rules of the court." 52 F.3d at 306 (citing 28 U.S.C. § 2632(b)). The CAFC did not "view the statements that the summons 'have the content' and be 'in the form, manner and style prescribed by the rules of the court' * * * as reflecting a legislative intent that compliance with those rules constitutes an essential element of the court's jurisdiction." *Id.* Rather, the CAFC viewed those statements as "housekeeping provisions." *Id.* at 307.

While *Pollack* involved the failure to comply with a Court form, in the instant case there was no failure to comply with a Court form or rule. It was Torrington who created the requirement that a separate summons be filed for each country whose results SKF appeals. If the CAFC in *Pollack*, however, did not find that the importer's failure to comply with a Court form was jurisdictional, then *a priori* SKF's failure to comply with Torrington's requirement of a separate summons cannot deprive this Court of jurisdiction. The Court, therefore, holds that the filing of a

single summons, in this case, does not deprive the Court of jurisdiction. There is no requirement that a separate summons be filed for each country contained in the administrative review.

Torrington contends that a separate summons must be filed for the Court to have jurisdiction over Commerce's decision for each country because 19 U.S.C. § 1516a, the rules of the Court and Form 3 use the singular form of the word "determination." In making the argument that the use of the singular form of "determination" in § 1516a(a)(2)(A) defines the Court's jurisdiction, Torrington makes a mountain out of a speck of dust. There is no indication that Congress intended the use of the singular form of "determination" to limit the Court's jurisdiction in the manner advocated by Torrington. Additionally, the fact that Commerce issues final results on a country-specific basis has no bearing on the Court's jurisdiction as defined by Congress.

Furthermore, the Court sees no reason why SKF should be required to file a separate summons for the decision made by Commerce for each country. Commerce issued its findings in one notice, based on one determination which encompassed all four countries from which SKF imports and exports AFBs. *See Final Results*, 63 Fed. Reg. 33,320. Since the issues and parties involved are identical, requiring a separate summons to contest the findings for each country would violate the principle of judicial economy and USCIT R. 1, which directs the rules to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." As SKF aptly states, "[i]t would have been wasteful of everyone's resources for SKF to pay filing fees of $600 (versus $150), and to prepare four sets of essentially identical summonses, complaints, as well as other papers, as to which the Court would then expend additional resources." Pls.' Opp'n to Def.-Intervenor's Mot. to Dismiss at 12, n. 28. There is no need to separate the action by country at the summons stage of litigation; if the Court later finds that the case has become unwieldy because of the number of countries involved in Commerce's determination, the Court has the discretion to order a severance.

For reasons of judicial economy and expediency, the Court does not impose a requirement that litigants wishing to contest the determination made by Commerce in a single review file separate summonses for each country contained in the review.

CONCLUSION

For the foregoing reasons, the Court denies Torrington's motion to dismiss the action for lack of jurisdiction.

(Slip Op. 99–106)

NEC CORP AND HNSX SUPERCOMPUTERS INC., PLAINTIFFS *v.* DEPARTMENT OF COMMERCE, DEFENDANT, AND SILICON GRAPHICS, INC., DEFENDANT-INTERVENOR

Court No. 99–07–00443

[Plaintiffs' Motion for Judgment Upon the Agency Record granted.]

(Decided October 8, 1999)

Paul, Weiss, Rifkind, Wharton & Garrison (Robert E. Montgomery, Jr., Terence J. Fortune, Matthew Chavez, Heather Keele) for Plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Lucius B. Lau); Patrick V. Gallagher*, Office of Chief Counsel for Import Administration, Department of Commerce, of counsel, for Defendant.

Wilmer, Cutler & Pickering (John D. Greenwald, Charles S. Levy, Sophie Moonen) for Defendant-Intervenors.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This case was brought by Plaintiffs NEC and HNSX pursuant to 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (1994), to contest a determination of the Department of Commerce ("Commerce") that their proposed importation of a SX–5 Series System supercomputer ("SX–5") was within the scope of an antidumping duty order issued on October 24, 1997. *See Notice of Antidumping Duty Order in the Antidumping Investigation of Vector Supercomputers From Japan*. 62 Fed. Reg. 55392 (Oct. 24, 1997) ("Order").

For the reasons set out in the opinion which follows, the Court holds that Commerce's scope determination is not supported by substantial evidence on the record and is not in accordance with applicable law. The Court further holds that Plaintiffs' proposed importation falls outside the scope of the antidumping duty order.

II. BACKGROUND

Plaintiff NEC, a Japanese corporation, sells vector supercomputer systems. HNSX is a wholly-owned United States subsidiary of NEC which markets NEC's products in the United States and Canada. In August 1996, in response to a petition by Cray Research, Inc.,[1] Commerce initiated an antidumping duty investigation to determine whether Japanese vector supercomputers were being sold at less than fair value in the United States. *See Initiation of Antidumping Duty Investigation: Vector Supercomputers From Japan*, 61 Fed. Reg. 43527 (Aug. 23, 1996) ("Initiation"). After the investigation and determination by the International Trade Commission ("ITC") that the import of vector super-

[1] Defendant-Intervenor, Silicon Graphics, Inc., is the parent of Cray Research. *Pub. A.R. Doc.* 2 at 2.

computers from Japan caused a threat of material injury, *see Notice of Final Determination of Sales at Less Than Fair Value: Vector Supercomputers From Japan*, 62 Fed. Reg. 45623 (Aug. 28, 1997) ("Final Determination"), Commerce issued the Order covering:

> all vector supercomputers, whether new or used, and whether in assembled or unassembled form, as well as vector supercomputer spare parts, repair parts, upgrades, and system software, shipped to fulfill the requirements of a contract entered into on or after October 16, 1997, for the sale and, if included, maintenance of a vector supercomputer.

62 Fed. Reg. at 55392. In 1996 Plaintiffs and Digicon Geophysical Corp., now Veritas, entered into a contract ("contract") by which Veritas leased NEC manufactured supercomputer systems and equipment from HNSX, and was to receive support services and software from HNSX during a minimum lease period of 48 months. *Pub. A.R. Doc. 1, Attachment*. The contract provided that Veritas would have access to upgraded supercomputing systems that became available during the term of the lease. It stated specifically that Veritas had:

> the option to substitute for an installed SX–4 Series hardware unit component * * * new or improved NEC manufactured equipment having feature improvements and/or an announced lower price for equivalent performance or capacity.

Id. at 18. Following execution of the contract on June 12, 1996, NEC and HNSX installed the SX–4 Series System ("SX–4") at the Veritas facility. In March 1999, Veritas instructed HNSX to substitute the SX–5 for the SX–4. Veritas stated in its March 12, 1999 letter to HNSX that it was exercising its option under the original contract and that because the existing contract was not covered by the Order, "the SX–5 Series system can therefore be made available to use in the United States." *Id.* at 1. In May 1999, Plaintiffs filed a Scope Determination Request seeking confirmation that the projected importation of the SX–5 would be outside the scope of the Order. *Pub. A.R. Doc. 2* at 1.

On July 9, 1999, Commerce issued its final scope determination finding that the SX–5 was within the scope of the Order. *Pub. A.R. Doc. 5*. In response to NEC's position that Veritas exercised an option in the 1996 contract when it ordered the importation of the SX–5, the Department stated,

> In determining whether the importation of the SX–5 is included within the scope of the order, the decisive factor is the date of sale, i.e. whether the date of sale is before or after October 16, 1997 * * *. The contracts exemption in the scope of the order was intended to exempt only those entries of vector supercomputer systems or vector supercomputer parts, upgrades, and systems that were specifically provided for in contracts entered into prior to October 16, 1997. The contract between HNSX and Veritas included an option to upgrade the SX–4 at some point in the future. However, this contract did not establish the essential terms of sale for the SX–5. The terms of sale for the SX–5 were set by an exchange of letters on

> March 12, 1999. Therefore, for purposes of the antidumping duty order on vector supercomputers from Japan, the upgrade to the SX–5 constitutes the formation of a new contract entered into on March 12, 1999. Accordingly, the importation of the SX–5 is subject to the order.

Id. at 7–8. Accordingly, Plaintiffs brought this suit challenging as unlawful the scope determination holding the importation of the SX–5 subject to the Order. Plaintiffs claim that Commerce's date of sale analysis is contrary to law, and that the option contained in the 1996 contract is enforceable as part of the 1996 contract and thus outside the scope of the order. Commerce defends its decision that the SX–5 is included within the scope of the Order, claiming that, rather than changing its terms, it reasonably clarified the Order because: (1) in the Order Commerce specifically reserved for the future the question whether merchandise purchased pursuant to an option that existed in a contract entered into prior to October 16, 1997 but exercised after that date would be subject to antidumping duties; (2) in establishing the meaning of the word "contract" contained in the Order, Commerce properly resorted to its own body of law; and (3) Commerce properly interpreted the word "contract" to mean the date upon which the material terms of sale are set.

III. Standard of Review

"In reviewing injury, antidumping, and countervailing duty investigations and determinations, the Court of International Trade must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record or otherwise not in accordance with law.'" *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996), (quoting 19 U.S.C. § 1516a (b)(1)(B)). Substantial evidence "is more than a mere scintilla," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); and "such relevant evidence as a reasonable mind might accept to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). When deciding whether Commerce's scope determination is correct the court employs the substantial evidence standard as follows: "In actions challenging a determination as to whether a particular type of merchandise is covered in an existing antidumping duty order, * * * this court must decide whether the challenged determination is supported by substantial evidence on the record and otherwise in accordance with the law." *Mitsubishi v. United States*, 16 CIT 730, 805 F. Supp. 455, 458 (1992) (citation omitted).

In reviewing the scope determination in this case, the Court's task is different from the one usually confronting a reviewing court. In the more typical scope determination review, such as in the *Mitsubishi* case cited above, the court reviews Commerce's application of a specific set of facts, usually the physical and technical specifications of the product at issue, with the terms of the antidumping duty order. That is not the task here. This dispute centers on Commerce's interpretation of the language "shipped to fulfill the requirements of a contract entered into on

or after October 16, 1997. * * *" 62 Fed. Reg. at 55392. The operative determination is whether the original contract required the shipment of the SX–5; therefore, this decision involves analysis of general contract law principles.

When a court reviews an issue within the special expertise of an agency, considerable deference is due. The Federal Circuit explained this principle as follows:

> Antidumping and countervailing duty determinations involve complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts. This deference is both greater than and distinct from that accorded the agency in interpreting the statutes it administers, because it is based on Commerce's technical expertise in identifying, selecting and applying methodologies to implement the dictates set forth in the governing statute, as opposed to interpreting the meaning of the statute itself where ambiguous.

Fujitsu, 88 F.3d at 1039 (citations omitted). The Court recognizes that Commerce has "broad authority to interpret its own antidumping duty orders. * * *" *INA Waltzlager Schaffler KG v. United States*, 108 F.3d 301, 307 (Fed. Cir. 1997). As a general rule, agencies are afforded deference in interpretation of their own orders, especially when the interpretation is of long standing and there are underlying policy reasons for the position. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) ("This broad deference is all the more warranted when, as here, the regulation concerns * * * 'the exercise of judgment grounded in policy concerns.'" (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

However, "[i]t is clear that no deference is due to an agency 'interpretation' fashioned for the purposes of litigation." *Alaniz v. Office of Personnel Management*, 728 F. 2d 1460, 1465 (Fed. Cir. 1984) (citation omitted). Here, Commerce's "date of sale" explanation is litigation strategy rather than a regular agency practice. In its brief, Defendant attempts to show that Commerce's date-of-sale analysis was part of regular agency practice: "[T]he inquiry facing Commerce in the *Final Scope Determination* was, in substance, no different that [sic] the inquiry facing the agency in its annual administrative reviews." *Def.'s Mem. in Opp. to Pls.' Mot. for J. Upon the Agency R.* at 36. Commerce attempts unsuccessfully to analogize the case before this Court to the circumstances in *Toho Titanium Co., Ltd. v. United States*, 14 CIT 500, 743 F. Supp. 888, (1990). In *Toho*, this court determined that in order to properly ascertain whether sales of titanium sponge in the United States were at less than fair value, "Commerce must determine the date when a sale has taken place." *Id.* at 501, 743 F. Supp. at 890. Commerce's finding that the date of sale occurred when the customer issued its delivery instructions to Toho was held "consistent with past administrative practice, * * * and is in accordance with law." *Id.* at 503, F. Supp. at 891.

The Court does not dispute that Commerce may determine when the date of sale of a product takes place. Comparing sales for the purpose of

determining whether there were sales made at less than fair value is within the core expertise of Commerce. However, Commerce does not as a regular practice determine the date of a valid contract.[2] Its equation of date of sale to date of contract is not past agency practice, deserving of deference to agency expertise, but merely a litigation tactic. Therefore, under these unusual circumstances, the Court must review Commerce's scope determination without according deference to the agency, and must look to general contract law to determine the meaning of the word "contract."[3]

IV. DISCUSSION

A. *The language of the Order is unambiguous and should be given its traditionally accepted meaning.*

The Court must first consider the plain meaning of the Order in determining its scope. "To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning." *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997)) (citation omitted).[4] If the language is clear and unambiguous, there is no need to further speculate as to what Commerce may have intended. *See id* at 1227. Additionally, language "is presumed to be used in its normal sense, in the absence of proof of a special meaning in the trade." *United States v. Esso Standard Oil Co.*, 42 C.C.P.A. 144, 151 (1955).

The government argues that "Commerce properly resorted to its own body of law, not state contract law or general contract principles," by interpreting the Order by way of its date of sale analysis. *Def.'s Mem. in Opp. to Pls.' Mot. for J. Upon Agency R.* at 25. In support of this contention it cites a statement by this court that "[w]hile Commerce is not precluded from referring to state contract law or general contract principles, it is not required to do so." *Toho,* 14 CIT at 504.

The Court's decision in this case is not at odds with the principles articulated in *Toho Titanium*. That case involved the determination of an antidumping duty rate: a responsibility delegated specifically to the Department of Commerce. This court noted that an absolute requirement that Commerce make its determinations based on state contract law could potentially result in contracts that were "insufficiently definite under the trade laws" or "inconsistent with the uniform administration of the antidumping law." *Id.*

The case at bar does not involve a technical determination in an antidumping duty order. Rather, it concerns the interpretation of the word "contract," a task not delegated to the expertise of Commerce. Hence,

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[2] For this reason as well, Commerce's regulations concerning "other scope determinations," 19 C.F.R. § 351.225(k) (1999), do not govern this case.

[3] Commerce argued in its brief that its decision warranted Chevron deference but abandoned its position at oral argument, held September 22, 1999, in favor of a "different kind of deference." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As explained, the Court here does not agree.

[4] The Court notes the difference between a regulation and an order and that the procedural safeguards in the regulatory process do not necessarily apply in the promulgation of orders. Therefore, the *Lockheed* tenet applies with even more force to agency orders.

Commerce's reliance on *Toho Titanium* is misplaced. Commerce has the authority to make an antidumping determination without limiting its consideration to state contract law. However, when the dispute falls outside the realm of Commerce's delegated duty, Commerce is required to interpret language in accordance with its plain meaning. "The 'plain meaning' rules of statutory construction apply to the interpretation of administrative regulations." *Whelan v. United States*, 529 F. 2d 1000, 1002–03 (Ct. Cl. 1976) (citations omitted).

As stated by the Federal Circuit in *NSK Ltd. v. United States*,, where a term with an "accumulated, settled meaning" has no special meaning in antidumping law, it should be accorded its ordinary meaning. 115 F.3d 965, 974 (Fed. Cir. 1997). "In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information including testimony of record." *Holford USA Ltd. v. United States*, 19 CIT 1486, ____, 912 F. Supp. 555, 561 (1995). The commonly understood meaning of the term "contract" comes from traditional sources, not Commerce's "own body of law."

The traditional definition of the term "contract" is "a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1:1 (Richard A. Lord, 4th ed. 1990) (citing RESTATEMENT SECOND OF CONTRACTS §1 (1979)). The Federal Circuit defines "sale" as the "transfer(s) of property from one party to another for a consideration." *NSK*, 115 F.3d at 975. Black's Law Dictionary defines the phrase "contract of sale" as an "agreement under which the seller agrees to convey title to property upon payment by buyer under terms of contract." BLACK'S LAW DICTIONARY 326 (6th ed. 1990). These accumulated and settled meanings of "contract" and "sale" are clearly distinct from each other, yet Commerce equates the phrase "date of contract" with "date of sale" in its scope determination. *Pub. A.R. Doc. 5* at 7. As in *Ericsson GE Mobile Communications Inc. v. United States*, "Commerce presents an absurd argument: [Plaintiffs] may not rely on the language of an order, but must instead apply a standard which Commerce has failed to articulate." 18 CIT 252, ____, 850, F. Supp. 34, 38 (1994), *aff'd in part, vacated in part on other grounds, and remanded*, 60 F.3d 778 (Fed. Cir.1995).

B. *The option to upgrade was part of the contract of June 12, 1996, and became binding when the contract was executed.*

The contract executed by Plaintiffs on June 12, 1996 covered many items. In its Addendum A, paragraph 5, the Contract provided Veritas with an irrevocable option to purchase more technically advanced vector computer systems in substitution for its SX–4 or to accept a lower lease rate. *Pub. A.R. Doc. 1, Attachment* at 18. This option was to become available when certain conditions, specifically set out in the contract, oc-

curred.[5] Thus, the parties were obligated on June 12, 1996 to perform the terms of the option. They were not free to change their rights and obligations concerning this option after that date.

A sale made under such a contract constitutes the performance of the obligations of the original contract, rather than a new contract in and of itself. An option contract is "a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." RESTATEMENT (SECOND) OF CONTRACTS § 25 (1981). Here, that option was an integral part of the valid contract covering the entire range of obligations surrounding the purchase, maintenance, and upgrade of a vector supercomputer system.

Significantly, Commerce does not contest that a valid contract for the option upgrade on June 12, 1996 was entered into at that time. Defendant-Intervenor, Silicon Graphics, Inc., did dispute the existence of a valid contract for the optional upgrade at the time of the original contract.[6] However, as Commerce's language in the scope determination confirms, all the elements of a valid contract for the option itself were in place on June 12, 1996. *Pub. A.R. Doc. 5* at 7 ("The June 12, 1996, contract specified that Veritas had the option to replace the installed SX–4 with newer or improved NEC-manufactured equipment having feature improvements."). Therefore, under general contract principles, the contract containing the upgrade option was entered into on June 12, 1996, and the exercise of the option after October 16, 1997 did not constitute a separate contract.

C. *Importation of the SX–5 is a legitimate exercise of the option and therefore falls within the exemption language of the order.*

Commerce has attempted to fulfill its duty of "clearly establish(ing) what products are covered," *Ericsson*, 18 CIT 252, ____, 850 F. Supp. at 38, by the language of the Order:

> The scope of this order consists of all vector supercomputers [and parts] * * * shipped to fulfill the requirements of a contract entered into on or after October 16, 1997, for the sale and, if included, maintenance of a vector supercomputer.

62 Fed. Reg. at 55392. The Court must determine whether the importation of the SX–5 was "shipped to fulfill the requirements of" the original contract entered into on June 12, 1996. If it was, the SX–5 importation is outside the scope of the antidumping duty order.

The Court agrees with Plaintiffs that the Order's language is "explicit and definite on the issue of its scope," *Mem. in Support of Pls.' Rule 56.2 Mot. for J. on Expedited Review of Admin. Determ. Upon Agency R.* at 14. As stated above, the "option to substitute for an installed SX–4 Series

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[5] "The conditions precedent [were] (1) the equipment must be 'new or improved NEC manufactured equipment having feature improvements and/or an announced lower price for equivalent performance or capacity:" (2) substitution may only be made for NEC products that have been installed at Veritas' facility for at least 24 months; and (3) the new equipment must be available in the United States," *Mem. in Support of Pls.' Rule 56.2 Mot. for J. on Expedited Review of Admin. Determ. Upon Agency R.* at 6, n.4., citing *Contract, Pub. A.R. Doc. 1.*

[6] At oral argument held on September 22, 1999. Silicon Graphics, Inc.'s response brief was stricken upon motion of Plaintiffs as it was filed late, contrary to the provisions of the Court's Order Establishing Expedited Briefing Schedule, dated July 28, 1999.

hardware unit component * * * new or improved NEC manufactured equipment having feature improvements and/or an announced lower price for equivalent performance or capacity," is a requirement of the June 12, 1996 contract. *Pub. A.R. Doc. 1, Attachment* at 18. There is no dispute that the SX–5 is indeed considered "new or improved NEC manufactured equipment." Under the plain meaning of the words of the Order, it is clear that importation of the SX–5 constitutes performance under a classic requirements contract entered into prior to October 16, 1997. The proposed substitution is therefore excluded from the Order, as an upgrade shipped to fulfill the requirements of a contract entered into before October 16, 1997.

D. *In substituting its "date of sale" analysis for the accumulated and settled meaning of the term "contract," Commerce unlawfully expanded the Order.*

The Court agrees with Plaintiffs that Commerce went beyond the scope of its authority by equating the phrases "date of contract" and "date of sale." Plaintiffs refer the Court to *Smith Corona Corp. v. United States*, in which the Federal Circuit detailed Commerce's permitted level of authority to construe the scope of an Order: "Although the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." 915 F.2d 683, 686 (Fed. Cir. 1990). The Order by its terms excludes requirements contracts entered into before October 16, 1997 from its mandate. *See* 62 Fed. Reg. at 55392 ("[T]he scope of this order consists of all vector supercomputers * * * shipped to fulfill the requirements of a contract entered into on or after October 16, 1997.").

The substitution of a "date of sale" test for the "date of contract" test results in an impermissible expansion of the order. Under its "date of sale" test, Commerce interpreted the word "contract" to mean the date on which the material terms of sale for the upgrade were set. *Def.'s Mem. in Opp. to Pls.' Mot. for J. Upon Agency R.* at 28. In its scope determination, Commerce stated that the terms of sale for the SX–5 were set by the exchange of letters on March 12, 1999, because that was when the price and date of substitution were established, and determined that the proposed importation was therefore subject to the Order as a contract entered into on or after October 16, 1997. *Pub. A.R. Doc. 2* at 7.

However, the shipment of the SX–5 was required by the original contract, not by the letter of March 12, 1999. General contract law requires that all material terms be established in the contract itself to bind the parties to the agreement. Yet the terms of the option itself do not need to be definite or specific.[7] Commerce's assertion that the price and date of substitution for the SX–5 needed to be specified in order for the option to

[7] Williston details the extent of definiteness required in legally binding contracts:

> Certainty with regard to promises does not have to be apparent from the promise itself, so long as the promise contains a reference to some document, transaction or other extrinsic facts from which its meaning may be made clear. Thus, a promise to do something * * * is sufficiently definite as soon as the external event occurs. * * * In fact, the most common illustration of agreements containing a reference to future events for a definition of their meaning is found in agreements to furnish a buyer's requirements or to sell the output of a certain plant or business. There is no doubt that such promises are sufficiently definite for enforcement.

SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 4:27 (Richard A. Lord, 4th ed. 1990).

be a valid part of the original contract creates an impermissible fundamental change in the effect of the Order. "Commerce has created a new standard, and has thus unlawfully expanded the scope of the Order." *Ericsson*, 18 CIT at ____, 850 F. Supp. at 38.

Though Commerce certainly had the opportunity to reference the "date of sale" in its original antidumping duty order as the decisive factor in determining whether an importation would be subject to the Order, it did not do so. Commerce argues that because in the initial Order, the Department indicated that it would reserve the question of option contracts for case by case determination, "the *Antidumping Duty Order* contains no *per se* rule concerning such options. Rather, Commerce contemplated that the exercise of these options may or may not result in merchandise that is subject to antidumping duties, depending on the contract at issue." *Def.'s Mem. in Opp. to Pls.' Mot. for J. Upon Agency R.* at 25. Commerce seems to argue that in failing to articulate a per se rule regarding option contracts, the Department put the Plaintiffs on notice that a different standard might be substituted for the plain meaning of the word "contract." The Court does not agree.

This reservation cannot permit Commerce to alter the plain meaning of a previously issued Order. It does not change the fundamental principle that "[p]arties must be able to rely on a final determination or order as written—they cannot be required to discern Commerce's intent in drafting a final determination or order." *Ericsson*, 18 CIT at ____, 850 F. Supp. at 38. As Plaintiffs aptly articulated, "case-by-case determinations regarding option contracts must follow the standard set forth in the Order, not a newly discovered and substantively different criterion." *Pls.' Reply to Def.'s Mem. In Opp. to Pls.' Mot. for J. Upon the Agency R.* at 9. Reserving the right to determine whether or not option contracts will be included in the scope of an antidumping order does not give Commerce carte blanche to expand the scope of the Order. "To hold otherwise would inject a degree of uncertainty into trade activities which Congress never envisioned." *Ericsson*, 18 CIT at ____, 850 F. Supp. at 38.

V. Conclusion

This case does not involve a review of how Commerce has applied a certain factual situation to the terms of its regulations and the statutes it is charged with implementing. The record consists solely of documents prepared by the parties during the antidumping investigation, the scope determination process, and the contract itself. The issues involved in this case are purely legal, "thereby making a remand * * * a mere formality. * * *" *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 431 (1947). Accordingly, the Court finds it unnecessary to remand for further action by Commerce.

The Court therefore holds that Commerce unlawfully expanded the scope of the Order in its determination of July 9, 1999 and the importation of the SX–5 is excluded from the antidumping duty Order on vector supercomputers from Japan dated October 24, 1997. Judgment will be entered accordingly.

ANNOUNCEMENT

Chief Judge Gregory W. Carman has announced the call of the Eleventh Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Tuesday, December 7, 1999 at the New York Marriott Marquis (45th Street & Broadway), 1535 Broadway, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is **"The Court at the Millennium".**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 300 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past ten Judicial Conferences.

All interested persons are invited to attend. The conference program, registration forms and additional information may be obtained through the United States Court of International Trade Judicial Conference Page on the Court's website, www.uscit.gov or by contacting the Clerk's Office at 212–264–2826.

Dated: October 20, 1999.

LEO M. GORDON,
Clerk of the Court.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/125 9/27/99 Musgrave, S.J.	Noble Tree Co.	96-12-02781	2008.99.25 32.9%	0804.10.60 4.1¢ kg	Agreed statement of facts	Los Angeles Pitted dates stuffed with almonds
C99/126 9/29/99 Aquilino, J.	Alcan Aluminum Corp.	95-4-00361	7601.20.90 Free of duty with merchandising processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandising processing and entitled to preferential treatment under the U.S.-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Alexandria Bay, etc. Aluminum in various forms and shapes
C99/127 9/30/99 Goldberg, J.	Mita Copystar America	90-5-00239	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta, New York, Savannah Photo-copier toner cartridges
C99/128 9/30/99 Goldberg, J.	Mita Copystar America	92-7-00428	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta, Chicago, Dallas, Los Angeles, New York Photo-copier toner cartridges
C99/129 9/30/99 Goldberg, J.	Mita Copystar America	92-10-00688	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta, Dallas, Los Angeles, New York Photo-copier toner cartridges
C99/130 9/30/99 Goldberg, J.	Mita Copystar America	93-8-00440	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta, Dallas, Los Angeles, New York Photo-copier toner cartridges
C99/131 9/30/99 Goldberg, J.	Mita Copystar America	94-1-00021	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Chicago, Dallas, Los Angeles, New York Photo-copier toner cartridges

C99/132 9/30/99 Carman, C.J.	Mita Copystar America	98–9–02763	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas, New York Photo-copier toner cartridges
C99/133 10/5/99 Aquilino, J.	NCR Corp.	97–6–01054	8471.20.00 3.9%, 3.5% for notebook computer assemblies 8471.91.00 3.9% for computer motherboards	8473.30.50 and 8473.30.10 Free of duty	Agreed statement of facts	Charleston Notebook computer assemblies and computer mother- board assemblies
C99/134 10/7/99 Watson, S.J.	Asics Tiger Corp.	95–12–01703	6404.19.15 10.5%	6403.19.45 8.5%	Agreed statement of facts	Long Beach Wrestling shoes

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